

United States
Circuit Court of Appeals
For the Ninth Circuit.

MITCHELL PETERSON,
Plaintiff in Error.

VS.


THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
for the District of Montana.

FILED

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Names [and Addresses] of Attorneys.

APPEARANCES.

W. F. O'LEARY, Esq., Great Falls, Montana, and
E. A. CARLETON, Esq., Helena, Montana,
For Plaintiff in Error.

JAMES W. FREEMAN, Esq.,
United States District Attorney, residing
at Helena, Montana,
For Defendant in Error.

*In the District Court of the United States, in and
for the District of Montana.*

THE UNITED STATES OF AMERICA,
Plaintiff.

vs.

MITCHELL PETERSON, et al,
Defendants.

BE IT REMEMBERED, that on the 21st day of
December, A. D. 1910, an indictment was presented
and filed herein, which said indictment is in the
words and figures following, to-wit:

INDICTMENT.

United States of America,
District of Montana.—ss.


In the District Court of the United States within
and for the District of Montana, of the term
of November, in the year of our Lord, one
thousand nine hundred and ten.

The grand jurors of the United States of America, duly impaneled, sworn and charged to inquire within and for the district of Montana, and true presentment make of all crimes and misdemeanors committed against the laws of the United States, within the State and District of Montana, upon their oaths and affirmations do find, charge and present:

That MITCHELL PETERSON, WALTER PETERSON, OSCAR PETERSON, MELVIN PETERON and CHARLES PETERSON, late of the state and district of Montana, on the 21st day of October, A. D. 1910, at, within and upon the Blackfeet Indian Reservation in the state and district of Montana,

One steer, branded "25" on the left ribs, of the property of Calf Looking, an Indian person,

One cow, branded, "17" on the left ribs, of the property of Bad Marriage, an Indian person,

One cow, branded  on the left thigh,
of the property of Catches Two, an Indian person,

One cow, branded \overline{OO} on the left hip of the property of Henry No Bear, an Indian person,

then lately before feloniously stolen, taken and carried away, did then knowing the same to have been so feloniously stolen, taken and carried away, feloniously buy and receive; that a more particular description of said cattle is now here to the grand jurors aforesaid unknown; that each and all of said Indian persons above named were then and there wards of the government of the United States and under the charge of the United States Indian Superintendent and Special Disbursing Agent in charge of the said Blackfeet Indian Reservation, in said state and District of Montana which said Blackfeet Indian Reservation is an Indian country, and under the exclusive jurisdiction of the United States; that the said Mitchell Peterson, Walter Peterson, Oscar Peterson, Melvin Peterson are and were then and there wards of the government of the United States and under the charge of the United States Indian Superintendent and Special Disbursing Agent in charge of said Blackfeet Indian Reservation; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

SECOND COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further, find, charge and present:

That said MITCHELL PETERSON, WALTER PETERSON, OSCAR PETERSON, MELVIN PETERSON and CHARLES PETERSON, late of the State and District of Montana, on the 29th day of August, A. D. 1910, at, within and upon the Blackfeet Indian Reservation in the State and District of Montana,

One cow branded $\overline{21}$ on the left shoulder, of the property of Dan Lone Chief, an Indian person,

One cow branded \mathcal{Z} on the right shoulder, of the property of Phillip Flat Tail, an Indian person,

One steer, branded "23" on the right hip, of the property of Ben Four Horns, an Indian person.

One cow, branded "30" on the right hip, of the property of No Runner, an Indian person,

One steer, branded \mathcal{P} on the right hip, of the property of Wild Gun, an Indian person,

One cow, branded, "O" on left thigh, of the property of Little Buffalo Stone, an Indian person,

One cow, branded "R" on the right shoulder, of the property of Young Bear Chief, also known as Bear Chief, an Indian person,

Ten head of other cattle, of the property of


various Indian persons, whose true names are to the grand jurors aforesaid unknown, then lately before feloniously stolen, taken and carried away, did, then knowing the same to have been so feloniously stolen, taken and carried away, feloniously buy and receive; that a more particular description of said cattle is now here to the grand jurors aforesaid unknown; that each and all of said Indian persons above named were then and there wards of the government of the United States and under the charge of the United States Indian Superintendent and Special Disbursing Agent in charge of the said Blackfeet Indian Reservation, in said State and District of Montana, which said Blackfeet Indian Reservation is an Indian country, and under the exclusive jurisdiction of the United States; that the said Mitchell Peterson, Walter Peterson, Oscar Peterson and Melvin Peterson are and were then wards of the government of the United States and under the charge of the United States Indian Superintendent and Special Disbursing Agent in charge of said Blackfeet Indian Reservation; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.


THIRD COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That said MITCHELL PETERSON, WALTER PETERSON, OSCAR PETERSON, MEL-

VIN PETERSON and CHARLES PETERSON, late of the State and District of Montana, on the 29th day of July, A. D. 1910, at, within and upon the Blackfeet Indian Reservation in the State and District of Montana,

One steer, branded  on the right hip, the property of Mrs. John Whiteman, sometimes known as Dirty Face, an Indian person,

One steer, branded  on the left hip, the property of Mary Teasdale, an Indian person,

Six other head of cattle, the property of various Indian persons whose true names are to the grand jurors aforesaid unknown, then lately before feloniously stolen, taken and carried away, did, then knowing the same to have been so feloniously stolen, taken and carried away, feloniously buy and receive; that a more particular description of said cattle is now here to the grand jurors aforesaid unknown; that each and all of said Indian persons above named were then and there wards of the government of the United States and under the charge of the United States Indian Superintendent and Special Disbursing Agent in charge of the said Blackfeet Indian Reservation, in said State and District of Montana, which said Blackfeet Indian Reservation is an Indian country, and under the exclusive jurisdiction

of the United States; that the said Mitchel Peterson, Walter Peterson, Oscar Peterson and Melvin Peterson are and were then and there wards of the government of the United States and under the charge of the United States Indian Superintendent and Special Disbursing Agent in charge of said Blackfeet Indian Reservation; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

FOURTH COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:


That said MITCHELL PETERSON, WALTER PETERSON, OSCAR PETERSON, MELVIN PETERSON and CHARLES PETERSON, late of the State and District of Montana, on the 7th day of July, A. D. 1910, at within and upon the Blackfeet Indian Reservation, in the State and District of Montana,

One steer, branded  on the left hip,

the property of Bryan Connelly, an Indian person,

One cow, branded  on the left hip,

the property of Bryan Connelly, an Indian person,

One steer, branded  on the left shoul-

der, the property of Joe Cobbell, an Indian person,

One cow, branded *NC* on the left shoul-

der, the property of Joe Cobbell, an Indian person,

Two other head of cattle belonging to various other Indian persons, whose true names are to the grand jurors aforesaid unknown, then lately before said date feloniously stolen, taken and carried away, did, then knowing the same to have been so feloniously stolen, taken and carried away, feloniously buy and receive; that a more particular description of said cattle is now here to the grand jurors aforesaid unknown; that each and all of said Indian persons above named were then and there wards of the government of the United States and under the charge of the United States Indian Superintendent and Special Disbursing Agent in charge of the said Blackfeet Indian Reservation, in said State and District of Montana, which said Blackfeet Indian Reservation is an Indian country, and under the exclusive jurisdiction of the United States; that the said Mitchel Peterson, Walter Peterson, Oscar Peterson and Melvin Peterson are and were then and there wards of the government of the United States and under the charge of the United States Indian Superintendent and Special Disbursing Agent in charge of said Blackfeet Indian Reservation; contrary to the form of the statute in such case made and provided, and

against the peace and dignity of the United States of America.

JAMES W. FREEMAN,

United States Attorney, District of Montana.

(Endorsed): No. 1712. United States District Court, District of Montana. United States of America, v. Mitchell Peterson, Walter Peterson, Oscar Peterson, Melvin Peterson and Charles Peterson. Indictment: A True Bill, Alfred B. Guthrie, Foreman of Grand Jury. Jas. W. Freeman, United States Attorney, District of Montana. Witnesses: Frank Monroe, Old Rock, Henry Marceau, Joe Tattsey, Doublecloth, Brocky, Dick Kipp, Eagle, Young Running Crane, Wallace Night Gun, Susie Goss, Ella Clark, Malcolm Clark, Joe Brown, A .E. McFatridge, Robt. Hamilton, Bill Upman, Old Person. Presented by the grand jury in open court, by their foreman, in their presence, and filed this 21st day of Dec. A. D. 1910. Geo. W. Sproule, Clerk By C. R. Garlow, Deputy. Bonds fixed at \$1000, Carl Rasch, Judge.

BENCH WARRANT.

United States of America,
District of Montana,—ss.

To the Marshall of the United States, for the District of Montana, and his Deputies, or any or either of them, Greeting:

WHEREAS, at a District Court of the United States of America for the District of Montana, begun and held at the city of Helena within and for

the District aforesaid, on the 21st day of December in the year of our Lord one thousand nine hundred and ten the Grand Jurors in and for the said District, brought into the said Court a true BILL OF INDICTMENT against Mitchell Peterson, Walter Peterson, Oscar Peterson, Melvin Peterson and Charles Peterson for buying and receiving stolen property as by the said Indictment, now remaining on file and of record in said Court, will more fully appear; to which Indictment the said Mitchell Peterson, Walter Peterson, Oscar Peterson, Melvin Peterson and Charles Peterson have not yet appeared or pleaded:

NOW, THEREFORE, You are hereby commanded, in the name of the President of the United States of America, to apprehend the said above named persons and them bring before the said Court, at the United States District Court Room, in the Federal Building, at Helena, Montana, to answer the Indictment aforesaid.

WITNESS, the Honorable CARL RASCH, Judge of the United States District Court, for the District of Montana, and the seal of said District Court, this 21 day of Dec. in the year of our Lord one thousand nine hundred and ten and of our Independence the 135.

GEO. W. SPROULE,
Clerk.

(Seal of Court)

By C. R. GARLOW,
Deputy Clerk.

MARSHAL'S OFFICE.

United States of America,
District of Montana,—ss.

In obedience to the Warrant, I have the body of the said Charles Peterson and Oscar Peterson before the Honorable District Court of the United States, in and for the District of Montana, at Helena, this 31st day of December, A. D. 1910.

ARTHUR W. MERRIFIELD,

U. S. Marshal.

By CHARLES MORGAN,

Deputy.

Mitchell Peterson,
Walter Peterson

Out on bonds.

After diligent search and inquiry the therein named
Melvin Peterson could not be found within the
District.

(Endorsed): No. 1712. United States District Court, District of Montana. United States of America vs. Mitchell Peterson, et al. Bench Warrant. Bail Fixed at \$1000 each. Carl Rasch, Judge. Filed Jan. 31st, 1911. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

*In the District Court of the United States in and
for the District of Montana.*

No. 1712, United States vs. M. Peteron, et al.

The United States Attorney with the defendants and their counsel present in court; and thereupon the jury returned into court and reported to the court that they only had agreed upon a verdict as to the defendant Walter Peterson, but were unable to agree as to the defendants Mitchell Peterson and Charles Peterson. Thereupon the jury was instructed and directed by the court to again retire for further deliberation, the defendants then and there excepting to certain instructions or remarks of the court, and exception noted. And thereafter the jury, having agreed upon a verdict, again returned into court, the defendants and respective counsel being present as before and thereupon the jury returned two verdicts, which were received by the court and ordered filed and entered, and are as follows, to-wit:

“We, the jury in the above entitled cause, find the following defendant, Mitchell Peterson, guilty in manner and form as charged in count one of the indictment, and the defendant not guilty as charged in counts two, three and four of said indictment, and recommend the greatest clemency by the court. H. H. Stanley, Foreman.”

“We, the jury in the above entitled cause, find the defendant Walter Peterson and Charles Peter-

son not guilty in manner and form as charged in the indictment. H. H. Stanley, Foreman.”

Thereupon defendants Walter Peterson and Charles Peterson discharged and their bonds exonerated as to the above entitled cause.

Thereupon time for sentence waived by defendant Mitchell Peterson, and thereupon said defendant Mitchell Peterson sentenced to serve twelve months and one day, at hard labor, in the United States penitentiary at Leavenworth, Kansas, and to pay a fine of Two Hundred Dollars and costs, and judgment ordered entered accordingly.

Thereupon, on motion of his counsel, said defendant Mitchell Peterson was granted sixty days in addition to the statutory time within which to prepare and serve bill of exceptions and to file petition for a new trial herein, defendant meanwhile released upon the bond heretofore given.

Entered, in open court, March 9, 1913.

GEO. W. SPROULE, Clerk.

ATTEST, a true copy of record:

GEO. W. SPROULE, Clerk.

By C. R. GARLOW, Deputy Clerk.

(Seal of Court.)

*In the District Court of the United States, District
of Montana.*

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHARLES PETERSON, MITCHELL
PETERSON and WALTER PETERSON, et al,
Defendants.

No. 1712.

VERDICT.

We, the jury in the above entitled cause, find the following defendant, Mitchell Peterson guilty in manner and form as charged in count one of the indictment, and the defendant not guilty as charged in counts Two, Three and Four of said indictment, and recommend the greatest clemency by the court.

H. H. STANLEY,

Foreman.

Filed and Entered March 29, 1913.

GEO. W. SPROULE, Clerk.

*In the District Court of the United States, District
of Montana.*

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHARLES PETERSON, MITCHELL
PETERSON and WALTER PETERSON, et al,
Defendants.

No. 1712.

VERDICT.

We, the jury in the above entitled cause, find the defendant Walter Peterson and Charles Peterson not guilty in manner and form as charged in the indictment.

H. H. STANLEY,
Foreman.

Filed and Entered Mar. 29, 1913.

GEO. W. SPROULE, Clerk.

*In the District Court of the United States, District
of Montana.*

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MITCHELL PETERSON,
Defendant.

No. 1712.

JUDGMENT.

The United States Attorney with the defendant and his counsel present in court.

The defendant was duly informed by the court of the nature of the charge against him, for the offense of feloniously buying and receiving certain stolen cattle, to-wit: one steer of the property of Calf Looking, an Indian person and ward of the government of the United States, one cow of the property of Bad Marriage, an Indian person and ward of the government of the United States, one cow of the property of Catches Two, an Indian per-

son and ward of the government of the United States, and one cow of the property of Henry No Bear, an Indian person and ward of the government of the United States, knowing the same to have been stolen, committed on the 21st day of October, A. D. 1910, at and upon the Blackfeet Indian Reservation, in the State and District of Montana, as charged in count one of the indictment herein; and of his indictment, arraignment and plea of not guilty and of his trial and the verdict of the jury of guilty as charged in said count one of said indictment.

And the said defendant Mitchell Peterson was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none, and no sufficient cause being shown or appearing to the court, thereupon the court rendered its judgment as follows, to-wit:

That whereas, the said defendant having been duly convicted in this court of the offense of feloniously buying and receiving certain stolen cattle, to-wit: one steer of the property of Calf Looking, an Indian person and ward of the government of the United States, one cow of the property of Bad Marriage, an Indian person and ward of the government of the United States, one cow of the property of Catches Two, an Indian person and ward of the government of the United States, and one cow of the property of Henry No Bear, an Indian person and ward of the government of the

United States, knowing the same to have been stolen, committed on the 21st day of October, 1910, at and upon the Blackfeet Indian Reservation, in the State and District of Montana, as charged in said count one of the indictment herein;

It is therefore considered, ordered and adjudged that for said offense you, the said Mitchell Peterson, be confined and imprisoned in the United States Penitentiary at Leavenworth, Kansas, at hard labor, for the term of twelve months and one day, and that you pay a fine of Two Hundred Dollars and costs taxed in the sum of \$1189.35 and be confined in said penitentiary until said fine and costs are paid or you are legally discharged according to law.

Judgment rendered and entered this 29th day of March, 1913.

GEO. W. SPROULE,
Clerk.

ATTEST: a true copy of Judgment:

GEO. W. SPROULE,
Clerk.

By C. R. GARLOW,
Deputy Clerk.

(Seal of Court.)

CLERK'S CERTIFICATE TO JUDGMENT
ROLL.

United State of America,
District of Montana,—ss.

I, GEORGE W. SPROULE, Clerk of the United States District Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the Judgment Roll in the above entitled action.

Witness my hand and the seal of said court at Great Falls, Montana, this 29th day of March, A. D. 1913.

GEO. W. SPROULE,
Clerk.

By C. R. GARLOW,
Deputy Clerk.

(Seal.)

(Endorsed): Title of Court and Cause. Judgment Roll. Filed Mar. 29, 1913. Geo. W. Sproule, Clerk, By C. R. Garlow, Deputy Clerk.

And thereafter, and on the 29th day of March, 1913, the court duly granted defendant sixty days in addition to the statutory time within which to prepare and serve bill of exceptions and to file petition for a new trial herein.

Be it further remembered, that upon the trial of the aforesaid cause, and on the 24th day of March, 1913, the defendant served and filed a motion herein, as follows:

(Title of Court and Cause.)

MOTION.

Come now the defendants above, by E. A. Carleton, Esq., their attorney, and move the court to dismiss the above entitled cause, and that the defendants, and all of them, may go hence without day, upon the grounds and for the reasons following, to-wit:

That this court cannot now constitutionally or legally try said defendants, or any of them, under the indictment herein; for that said defendants have not had a speedy trial of said cause, in this to-wit:

(a). That on the 14th day of October, 1911, the defendants herein were duly granted a new trial by this court, all of said defendants having been a short time before said date convicted in this court under the indictment herein, and that since said time three terms of this court have been duly and regularly held at which a jury has been in attendance, at any one of which said terms said cause could have been tried if it was ever intended or desired to try the said defendants again; that no efforts or any steps whatever have been taken to bring said defendants, or any of them, to trial under said indictment since the granting of their motion for a new trial, notwithstanding that three terms of this court have been held, and notwithstanding that said defendants have been ready, anxious and willing at all times to have said cause tried and disposed of if it was ever to be tried at all.

(b). That to now try said defendants, or either of them, upon the indictment herein, and after the lapse of such a long period of time since the filing of the indictment herein, and after the expiration of so long a period of time since the alleged offences charged in the indictment, were committed, and likewise after the expiration of so long a period of time since the granting of the motion for a new trial, would be a violation of the constitutional rights of these defendants and would be in disregard of due process of law.

The foregoing motion will be made upon affidavits and testimony to be introduced at the hearing and upon all the records and files in the case.

E. A. CARLETON,

Attorney for Defendants.

Due service of the foregoing motion is hereby admitted this 24th day of March, 1913.

J. W. FREEMAN,

United States Attorney.

(Endorsed): Title of Court and Cause. Motion. Filed Mar. 24-1913. Geo. W. Sproule, Clerk, by C. R. Garlow, Deputy.

That on March 25th, 1913, the defendant served and filed the following affidavits in support of said motion:

(Title of Court and Cause.)

AFFIDAVIT.

State of Montana,

County of Lewis and Clark.—ss.

E. A. CARLETON, first being duly sworn, on oath deposes and says: that he is the attorney of record for the defendants above named and as such attorney tried the aforeaid cause and secured a new trial of the defendants who were convicted under said indictment and which said new trial was secured on or about the 14th day of October, 1911; that since the granting of said motion for a new trial affiant has been anxious as have his clients to have said cause disposed of and he has been ready, willing and anxious at all times to have the same heard and determined at the earliest possible date, for the reason that the longer the trial is delayed the more dim become the facts and circumstances in the minds of the witnesses relating to the commission of the offences charged in the indictment; that considering the nature and character of the offences as adduced at the first trial of said cause, and particularly the verdict returned by the jury, affiant, as well as his client has seriously doubted whether or not the government would ever again try said cause or put the defendants again upon trial under said indictment, but have been expecting that the aforesaid indictment would be dismissed and this impression has grown stronger the longer the government has delayed to have said cause tried again; that since the granting of said

motion for a new trial three terms of this court with a jury have been held at any one of which said terms said cause could have been tried and disposed of if it was ever intended or desired to try said cause again; that affiant has made no application for any delay or postponement of said cause at any time since the granting the defendants their said motion for a new trial, and netiher he nor his clients have consented to the same, but that said postponements and delays have been occasioned solely by reason of the prosecution, and when there was ample time and opportunity to have tried said case long ago; that since said motion for a new trial was granted quite a large number of criminal cases have been tried, to the personal knowledge of affiant, and where the defendants were out on bail and in which cases indictments had been returned long subsequent to the said 14th day of October, 1911, when the said motion for a new trial herein was granted, and that the government had had due and ample opportunity to have tried said cause long since and to have had the same disposed of if it ever did wish to try it again.

And affiant further makes oath and says that by reason of the long period of time elapsing since said motion for a new trial of the aforesaid defendants was granted, that he has for sometime come to believe that said cause would never be tried again and that it would be ultimately dismissed.

And affiant further makes oath and says that the indictment charges a number of offences alleged to

have been committed sometime during the year 1910, and that so long a period of time has elapsed since said time and likewise so long a period of time has elapsed since the granting of said motion for a new trial, that it is now impossible for these defendants to have a fair and impartial trial under said indictment by reason of the lapse of said long period of time and that to now put these defendants upon trial under said indictment, under all the circumstances above named, would be to deny to them the right of a speedy trial.

E. A. CARLETON,

Subscribed and sworn to before me this 20th day of March, 1913.

E. D. WEED

Notary Public for the State
of Montana, Residing at
Helena, Montana. My Com-
mission expires Jan. 5th,
1915.

(Natorial Seal.)

(Endorsed): Title of Court and Cause. Affidavit of E. A. Carleton. Service acknowledged S. C. Ford, Asst. U. S. Atty. Filed March 25-1913. Geo. W. Sproule, Clerk.

(Title of Court and Cause.)

AFFIDAVIT.

State of Montana:

County of Cascade.—ss.

MITCHELL PETERSON, CHARLES PETERSON, and WALTER PETERSON, each being duly, severally sworn, each for himself and not one for the other, upon oath deposes and says: that he is one of the defendants above named; that the indictment herein was returned by the grand jury and filed on or about the 21st day of December, 1910, and that the trial of the aforesaid cause upon defendants' plea of not guilty, was begun on the 19th day of June, 1911, resulting in a verdict of guilty for Mitchell, Charles and Walter Peterson as charged in counts one, two, three and four of said indictment, and a verdict of not guilty for their codefendants, Oscar and Melvin Peterson; that thereupon sentence of defendants was suspended pending their motion for a new trial which was duly made and heard, and the same was duly granted by this Court on the 14th day of October, 1911.

And affiants further make oath and say that notwithstanding that their motion for a new trial herein was granted by the court on the said 14th day of October, 1911, that not one of them has ever been tried under said indictment since said time nor has the case of one of them ever been brought on for trial since their said motion for a new trial was granted, although affiants have always been ready,

willing and anxious to have said cause tried and disposed of at the earliest possible date, if they were ever to be tried again.

And affiants further make oath and say that they are reliably informed and verily believe their information to be true and therefore allege the fact to be, that there have been three terms of this court at which a jury has been in attendance since their said motion for a new trial was granted and that at any one of which said terms the aforesaid cause might have been brought on for trial and tried and disposed of if it was ever desired or intended to retry this case; that none of the affiants has ever consented to any postponement or delay of the trial of the aforesaid cause, nor have they made application for any postponement or any delay of the same, but that the same has been done solely by the prosecution without the consent of the affiant, and to suit solely the pleasure of the prosecution without the consent of affiants and to suit solely the pleasure of the prosecution; nor were said postponements or delays occasioned by any reason, as affiants are informed and verily believe, save and except a desire and wish of the prosecution not to try said cause sooner.

And affiants further make oath and say that since the granting of their said motion for a new trial as aforesaid, at different terms of this court which have been held since, many cases have been tried with a jury in which indictments have been returned by the grand jury long subsequent to the

return of the aforesaid indictment, and that many cases, where the defendants were out on bail and not imprisoned, were likewise tried and disposed of.

And affiants further make oath and say that to now put them on their trial under said indictment and after the expiration of nearly three years since the time the offences charged in the indictment herein are alleged to have been committed, and likewise after the expiration of more than sixteen months from the time their motion for a new trial herein was granted, would work the greatest hardship and injustice, in that, the witnesses have become more or less scattered and are now beyond the jurisdiction of the court and especially for the reason that the facts and circumstances relating to the several offences alleged in the indictment herein, have passed away and faded from the memory of the witnesses, to a very great extent making it impossible for the witness to now remember in detail the facts and circumstances connected with the alleged offences charged in the indictment herein.

MITCHELL PETERSON,
CHARLES PETERSON,
WALTER PETERSON

Subscribed and sworn to before me this 25th day of March, 1913.

E. A. CARLETON,
Notary Public for the State of Montana. Residing at Helena, Montana.
My Commission expires July 30, 1915.

(Notarial Seal.)

(Endorsed): Title of Court and Cause. Affidavit of Mitchell Peterson, Charles Peterson and Walter Peterson. Service acknowledged S. C. Ford Asst. U. S. Atty. Filed March 25, 1913. Geo. W. Sproule, Clerk.

That on the 22nd day of July, 1913, the defendant filed his Bill of Exceptions No. 1, being in the words and figures following, to-wit:

(Title of Court and Cause.)

DEFENDANT, MITCHELL PETERSON'S ENGROSSED BILL OF EXCEPTIONS.

No. 1.

BE IT REMEMBERED, that the above entitled cause came on for trial in the above entitled court, on the 26th day of March, A. D. 1913, before the Hon. Geo. M. Bourquin, District Judge presiding.

WHEREUPON, the Court asked if the parties were ready for trial. Thereupon the counsel for defendants announced to the court that the defendants were not ready for trial for the reasons stated in their written motion, heretofore duly filed in this court, and which said motion are supported by affidavits, moving the court to dismiss said case for the reasons stated in said motions and affidavits, and further announcing to the court that said motion had been set for hearing at this time.

BY THE COURT: These motions coming at this time are very much to be discouraged at the last hour, with the cases on trial and a jury in attend-

ance. When a case is set, or before it is set, all these motions should be disposed of, otherwise the jury is compelled to cool its heels around the corridor. This motion-under the rules is entitled to five days' notice, and if the Court otherwise ought to grant it, an objection made on that score the Court is inclined to sustain it.

BY MR. CARLETON: The papers show due service and supported by affidavits. I will say at this time we desire simply to make a record, and we should of course like to have been heard on the motion. We think there is a very serious proposition involved, namely the constitutional right of this defendant to be tried at this time.

BY MR. FREEMAN: All I have to say, there was some motion came in and we signed it; this morning they come in with some affidavits which, while we have accepted service this morning, at the same time I have only had time to glance over them; I don't know what they contain or anything of the kind. I suppose it will necessitate the matter going over so that we could have sufficient time to file counter-affidavit so they will set up what the true facts are with reference to the record in the case.

BY THE COURT: The affidavits also come too late; they should have been served with the notice of motion; and the Court will decline to entertain the motion, and exception can be noted.

BY MR. CARLETON: I would like to have an exception on this and at this time, so the record

can be clear, there are three of these several motions; I suppose the record may show they were all brought up, the same action taken by the Court, and the defendants in each and every case reserve their exception to the ruling.

BY THE COURT: Let the order be made that, the motions and affidavits not having been filed and served within the time required by the Court, the Court declines to entertain the motion.

BY MR. CARLETON: We desire also, in order that the record may be complete, to offer these affidavits in evidence, and also desire to offer some oral testimony in each case to corroborate and support the averments in the affidavits.

BY THE COURT: The Court having declined to hear the motion and said motions it being provided by the rules shall be heard upon affidavits, will refuse to entertain any such offer.

BY MR. CARLETON: And the record in each will show the exceptions of the defendants.

WHEREUPON, the Court directed a jury to be impaneled to try said cause which was accordingly done. Thereupon the District Attorney made opening statement to the jury. Whereupon Joe Brown, a witness for the Government was called and sworn as a witness.

Thereupon counsel for the defendants objected to the introduction of any testimony under said indictment and which said objection is as follows:

The defendants on trial in this indictment jointly and severally now object to the introduction of

any testimony under this indictment for the reasons stated in their written motion to which we now make reference and that those reason and matters stated in the written motion may be considered as now made a part of our objection.

BY THE COURT: The objection is overruled.

To the ruling of the Court in overruling said objection counsel for the defendants then and there duly excepted.

That the motion above referred to, to dismiss said cause, filed of record in this case, is in words and figures as follows to-wit:

(Here insert Motion to Dismiss.)

That the affidavits filed in support of said motion, and above referred to, are as follows:

(Here insert affidavits of Mitchell Peterson, Charles Peterson and Walter Peterson, and affidavit of E. A. Carleton.)

Come now counsel for the defendants herein and submit this as their bill of exceptions herein, to the action of the Court in refusing to entertain their said motion to dismiss this prosecution and to the refusal of the court to dismiss the same, and move that the same may be settled, allowed, signed and certified by the Judge as true and correct as provided by law.

W. F. O'LEARY, and
E. A. CARLETON,

Attorneys for Defendants.

Due service of the foregoing bill of exceptions is hereby admitted this 31st day of March, 1913.

JAS. W. FREEMAN,

United States Attorney.

United State of Montana,

District of Montana.—ss.

And now, on this 22nd day of July, 1913, and within the time allowed by law and the orders of this Court, the foregoing engrossed bill of exceptions to the action of the Court in declining to entertain defendants' motion to dismiss the prosecution herein or to hear evidence in support thereof, and to dismiss said prosecution, is hereby settled, allowed and signed and certified as true and correct, and contains substantially all the records and proceedings, matters and things relative to said matter.

Wherefore the same is hereby ordered entered as a record herein.

GEO. M. BOURQUIN,

Judge.

(Endorsed): Title of Court and Cause. Defendant Mitchell Peterson's Engrossed Bill of Exceptions No. 1. Filed July 22, 1913. Geo. W. Sproule, Clerk, by C. R. Garlow, Deputy.

That on May 2nd, 1913, and within the time allowed by law and the orders of the court, the defendant served and tendered the following bill of exceptions herein on his petition for a new trial, and that on the 22nd day of July, 1913, the same was filed and entered, and which said bill of exceptions is in the words and figures as follows, to-wit:

*In the District Court of the United States, District
of Montana.*

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MITCHELL PETERSON,
CHARLES PETERSON and
WALTER PETERSON,
Defendants.

DEFENDANT, MITCHELL PETERSON'S
BILL OF EXCEPTION ON PETITION
FOR NEW TRIAL

BE IT REMEMBERED, that the above entitled cause came on regularly for trial before the above entitled court, sitting with a jury, on the 26th day of March, 1913, the Hon. George M. Bourquin, United States District Judge, presiding.

The Hon. James W. Freeman, United States Attorney for the District of Montana, and S. C. Ford, his assistant, appearing on behalf of the United States and W. F. O'Leary and E. A. Carleton appearing on behalf of the defendants.

Whereupon the following testimony was introduced and the following proceedings were had and done in the trial of said cause.

The Hon. James W. Freeman, United States District Attorney thereupon made opening statement to the jury. Whereupon E. A. Carleton, Esq., of counsel for the defendants, likewise made open-

ing statement to the jury, in which statement counsel stated to the court and jury that the defendants would admit and did admit that the property described in the indictment herein, with the exception of the last three head in count four thereof, had been stolen as charged in the indictment and that the owners and brand of said cattle were as described therein and that this admission was made for the purpose of saving expense and shortening the trial.

Thereupon the court stated to counsel, that in view of the admissions of counsel for the defendants in his opening statement to the jury the trial of said cause should be materially lessened.

Thereupon Mr. Carleton, of counsel for the defendants, made in open court the following admissions:

Without waiving any right that we have under our objection just made to the introduction of any testimony in this case, the defendants now make the following admissions:

(Thereupon the court excused the jury for a period of ten minutes.)

MR. CARLETON: In count two let the record of this court show that the animal described as the Philip Flat Tail cow, that portion of the count, that it has been dismissed.

MR. FREEMAN: Well of course as far as that is concerned I want it understood that as to that at the last trial of the case Phillip Flat Tail was not present and that part of it was stricken out by

the order of the court necessarily but as far as evidence is concerned we shall offer that at the proper time.

BY THE COURT: The material thing now is that that count has been dismissed. I mean that part of the count with reference to Phillip Flat Tail.

BY MR. CARLETON: The defendants jointly and severally, without waiving any rights under their objection to the introduction of any evidence in this cause, now make the following admissions for the record: They each and all admit that all of the animals described in count one of cause number 1712 were received and branded by them and at the time they were stolen property. As to count two they make the same admission, the Phillip Flat Tail cow being eliminated.

BY THE COURT: The jury will understand that while the defendants are admitting that some of the cattle were stolen and received and branded they are not admitting that they knew it was stolen.

BY MR. CARLETON: It will be understood that this admission is without any prejudice. They are also prepared to admit—Likewise the same admission as to count three of the indictment. As to count four, the defendants and each of them now make the following admission: That as to the Bryan Connelly steer branded PY on the left hip, they admit this animal was received and branded by them, and that at the time it was stolen. But as to the three remaining animals they cannot make

any such admission, or make any admission of any kind.

BY MR. FREEMAN: I do not know whether this is going to amount to very much or not.

BY THE COURT: Well you are not obliged to prove ownership or that the cattle were stolen or received by these defendants, or branded but any other circumstances you must prove that is involved in that.

Whereupon the following witnesses were called and the following testimony was offered on the part of the prosecution, and being in substance all the testimony and evidence that was offered and introduced upon the trial of said cause, the defendants not offering any testimony.

JOE BROWN, a witness called and sworn on behalf of the plaintiff testified in sustance as follows:

DIRECT EXAMINATION BY MR. FREEMAN.

MR. FREEMAN: If the court please I may cover certain portions of the admissions. I can't cut the case down.

BY MR. CARLETON: We have no objection to that at all. I would request that you let us know which of the counts you are taking up first so we may know to what counts the evidence is adduced.

BY MR. FREEMAN: I don't know about that.

Q. State your name.

A. Joe Brown.

I have lived at Browning on the Blackfeet Indian Reervation fourteen years, and was living

there in the year 1910. At that time I was superintendant there of livestock on the reservation, and I held that position under Mr. McFatridge and was holding that position along the last of October and the first of October in 1910.

Q. State whether or not upon that occasion—whether or not along about that time you received any instructions as superintendent of livestock to round up the cattle or certain cattle in the fields and in the possession of the defendants, here?

BY MR. CARLETON: Objected to as irrelevant, incompetent and immaterial and outside of the issue in the case.

BY THE COURT: Oh, that's material, simply preliminary. Simply leading up to something else. Overruled.

BY MR. CARLETON: Note our exception.

A. Yes sir I did.

My instructions referred to the Peterson cattle.

Q. To what ones of the Peterson cattle?

BY MR. CARLETON: Objected to as incompetent, irrelevant and immaterial and hearsay.

BY THE COURT: Overruled.

BY MR. CARLETON: Note our exception.

A. I was instructed to gather all cattle that bore the Peterson brands and other brands aside from the Peterson brand.

Q. Those that bore the straight Peterson brand, did you pay any attention to them?

A. Yes sir.

Pursuant to that they deputized some man to

help me go and gather these cattle,—to pick up these cattle that were branded with other than Mr. Peterson's brands. I went out near the Canadian line where they had a ranch and from there we went to another ranch on the north fork of Milk River and from there to the home ranch on the south fork of Milk River and got cattle from two of the ranches. Malcolm Clark, William Haggerty, Joe McKnight, Matt Lytle, Joe Doyle, Dave Clair, Levi Bird,—I might have had another man, that is all at this time I remember I had with me at that time. We went out to the north ranch, went to Mr. Galbraith's place and stayed over night so that we could get an early start the next morning. We started early in the morning cutting out the cattle according to instructions.

BY MR. CARLETON: We object to any testimony unless confined to the cattle described in this indictment.

BY THE COURT: Overruled.

BY MR. CARLETON: Exception.

We cut out the cattle we wanted and brought them to Browning on the next day. After we got to Browning we made a particular examination of the brands of these various cattle. We took and put these cattle in a chute and clipped the hair on the animals so we could see the brands and took a record of the brands. I have a list of the brands here of the cattle that I took there at the time of the inspection. Among that bunch of cattle I found a steer branded 25 on the left ribs, the property of

one Calf Looking. I also found upon that occasion a cow branded TS on the left thigh, the property of Catches Two; also a cow branded OO on the left hip; I didn't find a cow branded 21 on the left shoulder, the property of Dane Lone Chief, there wasn't any like that.

Q. Tell us whether or not upon that occasion you found a cow branded CZ on the right shoulder?

A. A steer I have it here.

The CZ is the brand of Phillip Flat Tail's father, who is dead.

BY MR. CARLETON: I understand the Phillip Flat Tail animal is eliminated.

COURT: It may develop as a circumstance. Proceed.

Among that list I did not find a steer branded 23 on the right hip nor a cow branded 30, but there is a cow here branded R on the left thigh.

Q. A cow branded R on the right shoulder?

A. I have a steer here.

Q. You have a steer, but no cow?

A. No cow.

I have in this list a steer branded lazy FY on the right hip, also a steer branded YP on the left hip. The steer branded YP on the left hip had also a Y bar K brand on the left ribs, which brand belongs to Maggie Peterson.

Q. Tell us what brand the steer—if there was any other brand on the steer besides the lazy FY on the right hip?

A. Y bar K on the left ribs.

Q. And the cow branded O on the left thigh?

A. She had a Y bar K on the left ribs.

Q. And the cow branded,—and the steer branded CZ of Flat Tail?

BY MR. CARLETON: We object to that as incompetent, irrelevant and immaterial and serves no issue in this case and is an attempt to try an issue already disposed of.

BY THE COURT: Proceed. Overruled.

BY MR. CARLETON: Save an exception.

A. This steer was branded Y bar K on the left ribs.

Q. A steer branded 25 on the left ribs the property of Calf Looking, what other brand on that?

A. Lazy U lazy J on the right ribs.

That is the brand of Mitchell Peterson. The cow branded 17 on the left ribs, the property of Bad Marriage, also had on it the same lazy U lazy J on the right ribs. The cow branded TS on the left thigh, the property of Catches Two, had on it also the lazy U lazy J on the right ribs. Likewise the OO cow of Henry No Bear, had the same brand on it. We found a cow among this bunch branded JT on the left shoulder, which had a Y—K on the left ribs.

Q. State whether or not you found among the bunch of cattle a steer branded lazy P diamond on the left shoulder.

BY MR. CARLETON: The defendants object to any evidence regarding the branding of any other animals except those described in the indictment.

ment as incompetent, irrelevant and immaterial and an attempt to prove an independent offense.

BY THE COURT: I assume the prosecution sees a circumstance in it. The objection is overruled.

BY MR. CARLETON: Exception. And we object to all evidence regarding any other animals or their branding save and except those described in the indictment in the case now on trial.

Which exception was by the Court overruled to which ruling of the court counsel for the defendants then and there duly excepted.

A. This steer with the lazy P diamond on the right shoulder was branded RK on the left shoulder.

Q. And the JT,—I believe you stated that had a Y—K on it.

A. Yes, sir.

We found among that bunch a steer branded T anchor P, which had a D lazy P on the left ribs. The D lazy P brand is on my books as recorded to Mitchell Peterson.

Q. I will ask you whether or not in that bunch you found a cow branded HM on the left hip?

BY MR. CARLETON: Objected to for the reason stated in the last objection.

BY MR. FREEMAN: I expect to show as a matter of fact these cattle were stolen cattle and were in that field at that time.

MR. CARLETON: We object for the further reason that the count has already been dismissed

as the records of this court show and as we offer to prove.

BY THE COURT: There are circumstances under which that evidence is admissible.

BY MR. FREEMAN: We have already shown that they were in the field of the defendants upon this occasion. We are not going out and simply picking up animals that are out upon the open range, but in the fields of these defendants at this particular time.

BY THE COURT: You are claiming that these were all in the bunch together?

Objection. Overruled. Exception for defendants.

WITNESS: Yes sir.

Q. State whether or not you found a brand,—P lazy S on the left shoulder, a cow?

BY MR. CARLETON: We object to that for the reasons last stated.

BY THE COURT: Overruled.

BY MR. CARLETON: Exception:

A. Yes sir.

There was a Y—K brand upon that animal. The P lazy S brand belongs to an Indian by the name of Brockey. In that bunch we also found a steer branded ER on the left shoulder with the Y—K brand upon it. The ER brand belongs to an Indian by the name of Eagle.

Q. State whether or not among that bunch you also found a steer branded E2, the 2 combined with the top of the E, on the left shoulder?

BY MR. CARLETON: We object to that.

COURT: Overruled.

BY MR. CARLETON: Note our exception.

The E2 brand belongs to an Indian by the name of Young Running Crane. There was a Y—K brand upon it at that time.

Q. State whether or not you found among that bunch at the time a cow branded DC on the left hip?

BY MR. CARLETON: We object to that.

COURT: Overruled.

BY MR. CARLETON: Exception.

A. No sir.

Q. Do I understand you to say there wasn't a cow branded DC on the left hip?

A. I understood you to say BC.

Q. No, DC?

A. Yes, sir.

BY MR. CARLETON: If the court please I should like to have the record show that the defendants each and all object to all testimony regarding these and all other animals not described in the indictment herein and that they save an exception to the ruling of the court in each instance admitting such testimony.

BY THE COURT: The record may so show.

There was a cow branded DC on the left hip which belongs to an Indian by the name of Double Cloth. It had on it a Y—K brand also. When we went out there and gathered up this stuff at the Peterson ranches, Walter Peterson, Melvin Pet-

erson,—I don't just remember who all were there. They had the cattle rounded up in the field and were cutting out some cattle when we rode up. I think I spoke to Walter Peterson first when I rode up.

Q. Did you see Charles Peterson upon that occasion?

A. No sir. I don't think he was there.

There was also this man that they deputized to go with me there at the time. I don't remember whether Mitchell Peterson was there or not but there were some more. There were more helping them cut out the cattle.

Q. At the time that you took these cattle down to the Agency did you notify anybody as to what you were going to do at the Agency with reference to these brands?

MR. CARLETON: Objected to as incompetent, irrelevant and immaterial.

COURT: Overruled.

MR. CARLETON: Note our exception|.

Q. Who did you notify and what did you say to them?

MR. CARLETON: We object to that as incompetent, irrelevant and immaterial.

COURT: Overruled.

MR. CARLETON: Exception.

A. I told Mr. Charles Peterson and I don't remember which one of the boys. I told one of the boys that we were going to put them in a chute and clip them and take a record of the brands.

I think all of the defendants were present at Browning the next day, I am not positive. Oscar helped me. I think Walter was there. I am not positive as to Mitchell, Melvin was there.

Cross Examination.

(By MR. CARLETON.)

Q. Mr. Brown are you positive as to the ownership of that Y—K brand?

A. No sir, only what our records at the Agency show.

I have examined the records that I can testify that that brand belongs to Maggie Peterson. The old gentleman was not at his ranch when we came. We were at Peterson's ranch then. This was at the Agency. I am not mistaken about his being at the Agency. ID stock is cattle belonging to the Indians. That is the uniform brand of Indian Department stock. I saw some Y—K ID stock in that stuff we rounded up. I would not be positive that I ever saw any Y—K without the ID. I don't know whether there is any difference whatever in the ownership of those two brands. I don't know whether they are different ones or the same one. I don't know that Y—K ID is Mrs. Peterson's brand, and the Y—K is Mr. Peterson's brand. I don't know whether Maggie Peterson has her brand recorded or not. I am speaking of the registration at the Agency. In the case of a white man living on the reservation his brand is recorded at the Agency.

Q. When was this that you got orders to round

up this stock?

A. On October 31st, 1910, we seized the cattle. I seized them soon after I got orders from Mc-Fatridge. These orders were to go to his ranches and take all stock bearing any of the Peterson's brands with a fresh brand of another brand. That is, an animal having one of the Peterson's brands and having another brand to take it. Any with the straight Peterson brand not to take it, but if it had another brand besides the Peterson brand we were to gather and bring it in whether little or large.

Q. Were those instructions in writing?

A. Some of them had written instructions.

I was the boss of the bunch. I don't think my instructions were in writing.

Q. When you came to the Peterson ranches whatever cattle you found bearing any other brand and in addition one of the Peterson brands you brought in?

A. Not all of it. I found some that I consider they had bought and got permits for and it called my attention to times they had bought cattle that I knew of.

I don't remember how many head there were of that class. There might be say twenty head.

Q. So you weren't following your instructions but your own judgment in part?

A. Well partly. The Major told me to use my judgment.

I don't know what stock we gathered. There

were brought in sixty-seven head.

Q. You knew the Petersons were buying and selling cattle? It was nothing strange to find some cattle there with other brands upon them and as to the twenty head you stated yourself they belonged to the Petersons and left them out?

A. Yes, sir.

Q. Did you consider yourself the judge to pass on each and every head?

A. No.

Q. You wanted to bring in a goodly bunch and brought them in,—you brought in a whole lot you ought not have brought in, didn't you?

A. No sir.

Q. You told us at the other trial you turned out ten head in the field being satisfied they should not have been brought in?

A. We brought them in but we turned them back.

That brings the number down to fifty-seven head. The fifty-seven head were held, held there and disposed of.

Q. Didn't you say at the other trial that you turned back some of them to the Petersons?

A. That was included in this ten.

Q. No, independent of the ten, wasn't the ten turned out on the range and didn't you so testify?

A. I don't think I did.

My recollection would be better then than now. I said at the other trial that some of the Indians

came down there and told me or said in my presence that they had sold these cattle to the Petersons and got the money and the thing was all straight. I remember that. I haven't got a memorandum of how many there were of that class that I had gathered in.

Q. You told us before didn't you how many of that class there were. The Indians came down there and stated they had sold them and got money and the thing was allright, didn't you tell us before?

A. I might have.

Q. Isn't it a fact that there were a large number of head of cattle belonging to the Petersons that were sold to an Eastern buyer and the money paid back to the extent of two hundred and fifty dollars or more?

A. What do you call a large bunch?

Q. Well enough to bring two hundred and fifty dollars.

A. Yes, sir. I don't know what they brought but a number were sold.

And the money was turned over to the Petersons. I don't know what amount. I might have said at the other trial that it was two hundred and fifty dollars.

Such of these cattle as were not turned back to the Petersons were sold. As to this 25 steer of Calf Looking I only know what I heard.

All I pretend to tell you is that these are the brands that I took down in the rounding up of

the cattle. With reference to taking these brands in that book those were taken by chuting the cattle; we clipped the hair off the brands. I was right there with the book and as the brand disclosed itself I put it down, fifty-seven head in that book. There were sixty-seven head and ten were turned out and fifty-seven were kept. These were the only means I had of getting these brands. I know Melvin Peterson, a brother of the boys. I think he was there when we were clipping the brands. Oscar was helping me. I would not swear that either Mitchell or Walter was there. I don't know whether Charles Peterson was there at that time or not. Melvin didn't show me the brands that he had. I don't think I so testified before. Melvin showed me a list of brands but not there; not the list I have.

Witness Excused.

ARTHUR E. McFATRIDGE, sworn as a witness on behalf of plaintiff testified in substance as follows:

Direct Examination.

(By MR. FREEMAN.)

My name is Arthur E. McFatrige, and I live at Browning on the Blackfeet Indian Reservation. I have held the position of superintendent and special disbursing agent there since May 1st, 1910. I know Calf Looking, an Indian person. He is a ward of the government.

MR. CARLETON: We admit all that. We admit that all the Indians described in the indict-

ment are wards of the government and under the charge of Major McFatridge.

I saw Government's exhibit A executed before me by the defendants whose names appear there on the paper. It was executed in my office, at the time indicated, on November 10, 1910.

MR. FREEMAN: We offer this in evidence.

(Whereupon said Government's exhibit A was received in evidence, and is in the words and figures as follows, to-wit:

Cross Examination.

(By MR. CARLETON.)

The names of the three persons who signed the affidavit are Oscar C. Peterson, Walter Peterson and Mitchell Peterson. Oscar C. Peterson is the son of Charles Peterson and was a former defendant at the first trial. This affidavit was made known to Oscar. This affidavit was made in his presence but I am not going to say whether he read it personally before it was read aloud. I could not say at the present time which one read it aloud. Possibly I read it to them. They gave me the information in it. I am not prepared to testify positively who if anyone read the affidavit.

Q. I will ask you if you know he read the affidavit?

A. No, but I know they knew the contents.

All three of them were there at the same time. I am unable to state the time of day, I think it was in the afternoon. Deputy Sheriff Rickards of

Teton County was there but I am unable to say whether he heard it read or not. These are all those who were present that I now remember. Oscar is the first one who signed the affidavit. I don't know whether Oscar Peterson bought any cattle from Bostwick or not. I don't know, outside of his signing this paper, whether he told me he did or not. There were no cattle in this bunch bearing the brand of Oscar Peterson. I don't know that Oscar Peterson ever bought a single head of cattle in his life.

Q. If that should be true and shown to be true could you then explain how he would come to sign an affidavit in which he says he bought cattle from Johnny Bostwick?

A. I didn't understand at that time that Oscar Peterson made the affidavit that he purchased them personally. I understood at that time that the Peterson family were all working together in the cattle business and these three boys were in the office and were talking with me and said they had purchased some from him and had a list they had purchased.

I don't remember which one said that. One of the boys had a book containing a list of brands and this affidavit was prepared from information which they gave.

Q. But Joe Brown already had a list?

A. No, sir, there was a number of cattle in that affidavit that was not taken.

Joe Brown had made a record of the cattle long

prior to the signing of this affidavit. In my office I had a record of every animal that came in the corral except the ten turned out. There are some in that affidavit that were not in that corral, that they had on that book, that were in that list, and the only way I know they had those cattle was from information given me. I didn't tell the three boys, Oscar, Mitchell and Walter, that I wanted to get some evidence upon which to arrest Johnny Bostwick. I didn't give them to understand I was after Johnny Bostwick for stealing stock. Johnny Bostwick had left Browning and they told me they had purchased these cattle from him and I told them if they would go and find Bostwick and ascertain whether or not they had purchased them from him that then I would file a complaint against him and after they had told me where he was I wired to the sheriff of Choteau County and to some other person where they said they thought he had gone to arrest him on the information. So the matter of the arrest and prosecution of Bostwick was talked over.

Q. That talking about the arrest and prosecution of Bostwick was before the affidavit was signed wasn't it?

A. I am unable to state. I think it was before?

Q. Some little time before as a matter of fact?

A. I think that the affidavit was made some days after the boys had told me.

When I had the conversation I didn't have the affidavit made out and show it to them and ask

if those were not some of the stock they had bought of Bostwick. When they were called into the office the affidavit wasn't all prepared, it was prepared in the presence of Mitchell, Oscar, and Walter. I ran the typewriter. The heading of this affidavit was either read by them or read to them aloud by me.

Q. You told us on the former trial you guessed they read it?

A. I think they did, yes.

Q. Did you testify on the former trial that you guessed they read it?

A. I don't remember.

MR. FREEMAN: Object to the question.

COURT: Sustained.

Defendants except.

Q. Did I ask you this question referring to this affidavit? "You stated they read it? A. I suppose they did, they had it in their hands."

A. Might have been, I think that's correct.

Q. You think that this testimony I read is correct.

A. I do.

Q. Your memory would be better at the former trial than now?

A. Well, yes.

This case was first tried on June 11, 1911. I haven't said I was positive. I also stated I am positive that they either read it or I read it to them. I am positive that they knew the contents before they signed it.

Q. Were you also asked this question: "Do you now wish to qualify your answer." A. "I will say that they read it."

A. If I said that then it must be. I don't recall my testimony at the previous trial but if I said that then it is true.

Q. If the fact is that they read the affidavit and you read it, will you explain to this court and jury the occasion for both of you reading that affidavit?

A. They had a right to read it if they wished. It is a short document easily understood. I have no explanation to make why it should be read by both myself and them.

I don't remember the exact words I used at the last trial. My memory is such that I can recall, independent of this record, what took place in the office. I could not tell positively whether Oscar read the affidavit or not or whether Mitchell read it or whether Walter read it. I know they read it some of them and I know I read it and I am positive they understood the contents and gave me the information and signed it and swore to it. I will say I know they did.

Q. What was the occasion of having them make this affidavit?

A. I don't remember at this time just how it happened any more than they had stated to me that they had purchased a great many of these cattle from Johnny Bostwick and that they had a list of the cattle purchased from him.

Q. You don't feel very friendly towards the Peterson family do you?

When I ordered this committee to round up this stock I didn't know the Petersons then, they had been in the office, but I don't know everybody who comes into the office. I knew of them and about them. I knew that Peterson was quite a stock man.

Q. Buying and selling stock on quite a large scale?

A. Oh, I didn't pay any particular attention to that.

I knew at the time that he had bought cattle of Indians. The record showed that cattle had been bought from the Indians. Yes, it is the custom among Indians, in common with that of stockmen when buying from the Indians to vent the brand and put their own brand on. The reason why I ordered this stock with the Peterson's brand on and some fresh brand brought in without knowing they had bought the stock, was that I had information from a number of Indians that the Petersons had been stealing their cattle.

Q. Who are the Indians?

A. I don't know the names.

Q. Give the name of one?

A. Malcolm Clark.

Q. Anybody else?

A. I don't think of any other names.

My idea was to bring all this stock to the Agency and then examine it as to the brands and ascer-

tain if they were purchased according to the rules and regulations of the reservation. I had never proceeded that way with reference to any other stockman.

Q. Yet there were other stockmen buying of the Indians, did the same as the Petersons didn't they?

A. It is a fact that other stockmen buy cattle yes but the other stockmen bought cattle by getting the Indian that sells to get a permit. That permit is given to the purchaser and is a bill of sale.

I don't mean to say a permit is given in all cases but it is issued in all legitimate sales. They had these rules under my predecessors.

Q. You don't pretend to say it is unusual for other stockmen to buy without a permit?

A. Well they might have done it in the past.

Q. It was nothing unusual.

A. No.

The regulations provided that they must get a permit. Out of this bunch that was brought in some Indians came down there and stated that they had sold such animals to the Petersons. I would say there were six or eight probably. In cases where there were no permits, according to the regulations, the Indian was required to pay the purchase price to the person who bought and the cattle were sold and the money paid to the owner.

Q. You stated you sold a number of head, many of which was turned back to the Petersons.

A. I sold a number of head, I forget the firm

now,—and the money was returned that the Petersons paid for the cattle, and the balance of the money was paid to the owner of the cattle.

After taking out the number of head that we turned out and the number that were turned back to the Petersons, I don't remember how many head that left that were sold.

Q. All the Indians who claimed they had lost stock were paid back their money for the stock?

A. Well no, not all of the Indians. All that had stock in that bunch were paid back.

Q. At that time you had not formed any opinion or purpose to prosecute the Petersons for stealing that stock?

(An objection is sustained to which defendants except.)

I remember the last trial of this case.

Q. Do you remember talking about this case when you returned to Browning in the Kipp Hotel when there were a large number of people around?

A. I don't know as I did. I don't remember.

I didn't say on that occasion that before I got through with them I would send the whole bunch to the penitentiary or break them. I didn't feel disappointed that Oscar and Melvin were acquitted. I never expressed an opinion that I felt very grateful that the old gentleman and the two boys were convicted. I feel that anyone violating the law should be punished. If they were guilty I did feel that way.

EXCUSED.

LEVI BURD, a witness called and sworn on behalf of the plaintiff testified as follows:

Direct Examination.

(By MR. FREEMAN.)

My name is Levi Burd, and I have lived at Browning on the Blackfeet Indian Reservation twenty years, north of the Agency about twenty miles. I know all of the defendants here, and Johnny Bostwick.

Along about the 21st of October, 1910, I had occasion to go by the Peterson ranch there upon the reservation. I went there to the Peterson ranch to see Melvin Peterson. When I got to their ranch I found Charles Peterson, Walter and Melvin and Mitchell Peterson, Johnny Bostwick and a couple of the little Bostwick boys. When I got there they were branding cattle in their corral. Mr. Charles Peterson had a book in his hand and seemed to be taking down notes. Johnny Bostwick and Mitchell were roping. Walter and Melvin were on the inside. I saw in the corral at that time that I am able to remember a 25 white faced steer, branded on the left ribs; a T anchor P steer and a \overline{OO} cow on the left hip and a 17 heifer. I could not say exactly now whether or not there was a cow there branded TS. I remember that at that time but it has been a long time ago. I would judge there were about ten or twelve head of cattle at that time in the corral. They left them there.

Q. What brands were put on them?

A. UJ on the right ribs and I think a DP on

the left ribs, I guess. That brand belongs to one of the Peterson boys as does also the lazy UJ. There wasn't a word said by me or them with reference to these cattle or the branding. The time I was there was in the afternoon. I was there about an hour. They finished branding before I left. They branded this 25 steer and this DP and this little steer, the others I don't remember. I had occasion about ten days afterwards to go to the Peterson ranches in company with Joe Brown. Upon that occasion we went to the Petersons north ranch and gathered some cattle brought them over to the south ranch and gathered some there. I think that Melvin and Walter was there when I got there. There may have been some more of the boys outside of our crowd. The only other person at the other ranch when I first went there was a man taking care of the place. I rounded up certain cattle there which were taken to Browning. I wasn't there at the time the animals were put through the chute and clipped.

Cross Examination.

(By MR. CARLETON.)

The first date that I speak of about being there was October 21, 1910, somewhere around there. There was some branding going on then. I know what stock it was that they were branding. There was a 25 steer in there, \overline{OO} cow, 17 steer, T anchor P steer and several others I don't remember. I think that Walter and Melvin were doing the branding at that time. I think my memory is now so I can tell

you that those were the two. The time was right about dinner sometime. The branding was going on at their house.

Q. Did you have dinner? The whole thing was out in broad daylight?

A. Yes sir.

They didn't suspend operations because I came, everything went on just the same. I didn't have dinner with them. I am not an officer on the reservation and was not at that time. I went there because I wanted to see Melvin.

Q. You saw nothing to arouse your suspicions?

A. No sir.

That corral where they were branding is situated about a quarter of a mile from the road. Anybody can see from the road what is going on there if they look. This 17 animal I am sure was a cow. I was there about an hour. The matter of the stock was not discussed in any way. I transacted my business and went away and that is all there is to it.

With reference to taking down any brands my recollection is such that I can state pretty near what each and every person who was there was doing during the hour I was there. I wasn't with Melvin at all after the branding was over. I don't know whether Mr. Charles Peterson took down the brands in a book or not,—I said he was on the outside. He had a book in his hand but I don't know if he took them down or not. I don't know whether Walter was the one who did the writing or not, I

know Peterson had a book in his hand. I don't recollect whether I saw Mr. Peterson give Walter the book or not?

Q. You knew at the time that Mr. Peterson was a stockman and buying and selling stock and the transaction didn't impress itself upon you?

A. No sir.

Q. You saw nothing suspicious about it?

A. No sir.

Redirect Examination.

(By MR. FREEMAN.)

Q. Johnny Bostwick was there was he not assisting in roping the animals?

A. Yes sir.

Recross Examination.

(By MR. CARLETON.)

I didn't report anything about Johnny Bostwick or anybody else as a result of that visit.

EXCUSED.

JOE BROWN, a witness called on behalf of plaintiff being recalled for further cross examination, testified in substance as follows:

I have the book here which I gave you yesterday in which I said I took down the brands as I chuted the cattle.

Q. Now I notice just preceding that a list of some of the same stock on the two pages preceding. Will you tell us what it is?

A. Some of the same stock you say?

Q. Well is it?

A. No sir.

Not a head. The two pages of this book which have been marked by the stenographer for identification as exhibits one and two for the defendants were copied from the brand book by me and which brand book was held in the hand of Melvin Peterson there at the Agency. I told you that Melvin did have a list of some brands. That is not the list I referred to. What I refer to is a shipment of cattle which Melvin had on his book.

Q. Isn't some of Bostwick's stock in there?

A. No sir.

Q. Some Bostwick stock had been shipped before?

(This question is objected to by the District Attorney as not proper cross examination and the objection is sustained and the defendants except.)

Redirect Examination.

(BY MR. FREEMAN.)

Q. Among these cattle that were driven in from the defendants state whether or not there was an animal branded MF belonging to Frank Monroe.

BY MR. CARLETON: We object to that.

BY MR. FREEMAN: It is our object to show that at the time they went out there there was other stolen property in the possession of the defendants.

BY MR. CARLETON: We desire the record to show we object on the further ground that it is an attempt to prove an independent offense not charged here.

BY THE COURT: The objection is overruled.

Exception by defendants.

A. Yes sir, there was.

Q. Of the property,—the MF, whose brand is that?

A. It belongs to Frank Monroe.

Q. State also whether or not there was an animal branded JT?

BY MR. CARLETON: Same objection as before.

BY THE COURT: Same ruling.

A. Yes sir, there was one cow with a JT on the left shoulder and a Y-K on the left ribs.

The JT brand belongs to Joe Tatsey.

Recross Examination.

(BY MR. CARLETON.)

I said the MF brand belongs to Frank Monroe, I didn't say the animal belonged to him.

Q. You don't know whether it had been sold or disposed of or not?

Objected to as not proper, objection sustained and exception noted.

I simply testified as to the JT brand. I don't pretend to say whose animal it was.

EXCUSED.

OLD ROCK, sworn on behalf of plaintiff testified through an interpreter in substance as follows:

Direct Examination.

(BY MR. FREEMAN.)

My name is Old Rock and I live at—south of the Agency on the Blackfeet Reservation. I don't know Charles Peterson and his two sons by their names. I think the man sitting over there between the two

boys is Charles Peterson (indicating the defendant Charles Peterson). I have got cattle.

Q. Can you tell us the brand of the cattle, your brand?

BY MR. CARLETON: Object to the question as incompetent, irrelevant and immaterial as no property of Old Rock is described in the indictment.

BY THE COURT: For the same reason the court has given that a person who is charged with receiving stolen goods, if it can be shown at the same time that he has other stolen goods, it is a circumstance that the jury can consider in finally determining whether he had guilty knowledge that the goods were stolen.

BY MR. CARLETON: Note our exception.

A. I can't call the brands by English myself.

Q. Can you make the brands for us?

A. I don't know the figures, I don't see very well.

The paper you show me marked Exhibit B is my brand. It is a Diamond, a half circle and a bar. That is what I put on my animals.

Q. I will get you to state whether you were down at the Agency the first part of November of 1910 about two years ago?

BY MR. CARLETON: Objected to as incompetent, irrelevant and immaterial and an attempt to prove a different offense and we are not prepared at this time to try that offense at this trial.

BY THE COURT: The objection will be overruled for the same reason as stated before.

BY MR. CARLETON: Note our exception.

A. I was.

Q. Did you find any of your cattle there?

BY MR. CARLETON: Objected to for the same reason as before stated and I wish it to be understood that the objection goes to the entire line of testimony on this point.

BY THE COURT: The objection will be overruled and an exception considered taken to all of it.

A. Yes sir.

Q. Where did you find it Old Rock, whereabouts?

A. In the government corral.

It was a steer. I never sold that steer that I found at the government corral, at the Agency.

BY THE COURT: What is this brand you have on Exhibit B?

BY MR. FREEMAN: It might be a diamond lazy P. Also lazy P diamond.

I never gave anybody permission to drive this steer away that I found there at the Agency. Nor did I ever authorize anyone to tell one of the Petersons that they could put an RK on this animal.

Cross Examination.

(BY MR. CARLETON.)

BY M. CARLETON: We now move to strike out all the testimony of this witness for the reason that it has no bearing on this case at all.

BY THE COURT: The motion is denied.

MR. CARLETON: Save an exception.

I don't know Johnny Bostwick, by that name, don't know any English names. I know his Indian name, which is One Leg. I didn't know One Leg came down there on the south side of the reservation where I live and stole a lot of cattle.

EXCUSED.

DAVE PAMBRUM, a witness sworn on behalf of the plaintiff testified in substance as follows:

Direct Examination.

(BY MR. FREEMAN.)

My name is Dave Pambrum and I live below, east of Browning, about four miles.

Q. Are you acquainted with Charles Peterson and his sons?

A. I know the boys, don't know the old man.

I own the T anchor P brand upon the reservation. This brand is on the shoulder and on the ribs alike, on the left side. I was called to the agency along the first of November, 1910. I saw some cattle of mine down there upon that occasion in the government corral. I saw a steer coming two years old with my brand on it. I hadn't ever before that time sold or disposed of that animal to any one.

BY MR. CARLETON: We object to the question as incompetent, irrelevant and immaterial.

BY THE COURT: Yes, let the objection go as to all testimony of this character and the same ruling will be made and an exception is considered taken to all of such testimony.

At the time that I recovered the animal there was another brand upon it besides my own. I don't

know whose brand it is but it belongs to one of the Petersons. I could recognize the brand if I saw it again. The paper you show me is the same brand that I saw there.

Q. Do you know the English name of that, whether it is called a DP or not?

A. Yes sir.

I never gave any person permission to put this other brand upon my animal known as the DP brand. I never gave any one permission to drive this animal from the range.

Q. Do you know where the Petersons live?

A. I have never been there but I have been close around there.

Their places are, approximately, about 18 to 20 miles from my place. I missed this animal when it first got away, but after that I never paid any attention to it. When I first missed it it was about August, 1910. When I found it it was at the agency corral. I have other cattle there on the reservation.

Cross Examination.

(BY MR. CARLETON.)

Q. You never accused any of these defendants of stealing it?

BY MR. FREEMAN: Object to that question whether he did or not.

Which said objection was by the court sustained and counsel for the defendant then and there duly excepted.

I don't know how long a period of time it was

from August 1, 1910, until I found the animal at the agency, but in August sometime. Sometime along in November I guess, I went to the agency. My steer was there with a lot of other cattle. He was driven with those other cattle. I didn't see anybody put the brand on him. All I know about it is that I simply went down there and saw this animal and it had in addition to my brand a DP brand. That is all I know about the case.

HENRY MARCEAU, a witness called and sworn on behalf of the plaintiff, testified in substance as follows:

Direct Examination.

(BY MR. FREEMAN.)

BY MR. CARLETON: We object to any testimony given by this witness for the reason there is no Henry Marceau animal described in the indictment.

BY THE COURT: Objection overruled.

BY MR. CARLETON: Note our exception.

My name is Henry Marceau and I live on Milk River on the Blackfeet Indian Reservation. The brand for my cattle is HM on the left hip. Sometime in the fall of 1910 I was called down to the agency at Browning about an animal of mine. I went down to the agency.

Q. What did you find down there with reference to any of your own cattle?

A. One red cow of mine.

That cow had another brand on it beside my own brand, HM.

Cross Examination.

(BY MR. CARLETON.)

Q. You never accused any of these defendants of stealing it?

BY MR. FREEMAN: Object to that question whether he did or not.

Which said objection was by the court sustained and counsel for the defendant then and there duly excepted.

I don't know how long a period of time it was from August 1, 1910, until I found the animal at the agency, but in August sometime. Sometime along in November I guess, I went to the agency. My steer was there with a lot of other cattle. He was driven there with those other cattle. I didn't see anybody put the brand on him. All I know about it is that I simply went down there and saw this animal and it had in addition to my brand a DP brand. That is all I know about the case.

HENRY MARCEAU, a witness called and sworn on behalf of the plaintiff, testified in substance as follows:

Direct Examination.

(BY MR. FREEMAN.)

BY MR. CARLETON: We object to any testimony given by this witness for the reason there is no Henry Marceau animal described in the indictment.

BY THE COURT: Objection overruled.

BY MR. CARLETON: Note our objection.

My name is Henry Marceau and I live on Milk

River on the Blackfeet Indian Reservation. The brand for my cattle is HM on the left hip. Some time in the fall of 1910 I was called down to the agency at Browning about an animal of mine. I went down to the agency.

Q. What did you find down there with reference to any of your own cattle?

A. One red cow of mine.

That cow had another brand on it beside my own brand, HM. I think the other brand was the RK brand. I had never sold that red cow to anyone, nor had I ever given anyone permission to put that RK brand on it.

Q. Did you ever tell anyone that they could drive this cow off from your place on the range where it was running?

A. Yes sir.

Q. Who did you tell he could drive it away?

A. I spoke to a fellow about the cow and he told me he drove the cow away from the range and I asked him why he drive the cow away.

Q. No, I mean did you ever tell anyone they could drive it away?

A. No, I didn't.

Cross Examination.

(BY MR. CARLETON.)

That brand, HM on the left shoulder, is my brand. I own this animal. Robert Hamilton didn't own it. I don't know whose brand HN is. The brand on this animal was HM. I don't know who put the RK on. I didn't see it put on, but I saw it on the

animal. All I know about the case is that I went down there, having missed this HM animal and I found it there and I got my money for it. The agent paid me. I didn't lose anything.

BROCKEY, sworn as a witness on behalf of the plaintiff through an interpreter testified in substance as follows:

BY MR. CARLETON: We admit that as to this character and line of testimony that the parties are the owners of the various brands and never gave anyone permission to drive the cattle away.

BY MR. FREEMAN: This was a cow. One of those testified to by Brown as being gathered in, branded P lazy S on the left hip and at the time that he recovered it at the agency corral had a Y-K brand on it.

BY MR. CARLETON: It is all admitted.

BY THE COURT: It will be understood it is objected to and an exception noted in each instance with this entire line of examination.

Whereupon the witness Eagle, sworn on behalf of the plaintiff testified in substance as follows:

Direct Examination.

(BY MR. FREEMAN.)

BY THE COURT: What animal do you assign for this witness?

BY MR. FREEMAN: The animal branded ER on the left shoulder and a steer that he recovered from the agency corral in the first of November, 1910. The animal was driven from the ranches of the defendants and at the time he recovered it

it had the Y-K brand belonging to Maggie Peterson on it. The witness never sold the animal, never gave anyone permission to dispose of it.

BY MR. CARLETON: It is all admitted.

BY MR. FREEMAN: Ask him if he remembers how long before he found his animal at the agency corral it was that he missed it.

A. He says it was a young animal and when he found it it was quite a size.

Q. Where do you live on the Reservation with reference to the agency?

A. This side.

I don't know where the Petersons live, I only see them around town. I live south of the agency quite a ways.

YOUNG RUNNING CRANE, sworn as a witness on behalf of the plaintiff, testified in substance as follows:

Direct Examination.

(BY MR. FREEMAN.)

My name is Young Running Crane and I live at the old agency. I don't know what south is. I don't know about the miles, I couldn't say how far it is from where I live to Browning. It takes a quarter of a day to go there. I know Charles Peterson and his two boys that live on the reservation. I was called to the government corral there at Browning along about two years ago last fall to see about an animal that was in the corral with my brand on it. I saw some of my cattle, a steer.

Q. Did it have any other brand on it besides

yours?

A. All the brand I looked for was mine, I didn't notice any other brand.

I can tell my brand if I see it. That is my brand that you show me. That is an E2 connected at the top on the right shoulder. I never sold this steer that I found there at the agency corral to anyone. I never gave anyone permission to drive it away from where I live where it ranged down by the old agency.

DOUBLE CLOTH, sworn on behalf of the plaintiff testified in substance as follows:

Direct Examination.

(BY MR. FREEMAN.)

My name is Double Cloth and I have some cattle over on the Blackfeet Indian Reservation. I was called over to the agency about two years ago last fall to see about an animal of mine that was there in the corral.

Q. What did you find over there?

A. My brand.

Q. What is your brand?

A. I can't pronounce it.

BY MR. CARLETON: We admit that DC is the brand of the witness, and that it had the Y-K on it. We admit she never did authorize anyone to do it.

I live thirty miles from the agency.

Q. Do you know Charles Peterson and his boys?

A. I don't know him.

DICK KIPP, sworn on behalf of the plaintiff

testified in substance as follows:

Direct Examination.

(BY MR. FREEMAN.)

My name is Dick Kipp and I live at Blackfeet about seven miles from the agency. I am not acquainted with Charles Peterson and his two sons that are on trial here. I know where they live.

Q. How far is it from where they live?

A. Well I can't say, quite a ways.

It would take a good days ride to go from my place. I have a recorded brand for my cattle. I can't read it, I don't know what they call it.

Q. I will show you a brand here.

(Counsel shows witness a brand.)

BY MR. CARLETON: We admit that this is his brand.

A. That is not my brand at all. (Referring to paper counsel showed him.)

That is my brand, on government's exhibit C. It is on the right side of the animal. I was called to the agency corral two years ago last fall to identify an animal of mine. They brought me there and they got the animal in the corral there. Jim Brown brought him in. I found an animal of mine there in the government corral.

Q. What other brand did he have besides your brand?

A. I don't know if it had any other brand or not. I had never sold that animal to anyone or given anyone permission to put any other brand upon it.

Q. Did you ever give anyone permission to drive

it off of the range?

A. I didn't stop them at all.

Q. I want to know whether you gave anyone permission to drive the animal any distance away?

A. No, sir.

BY THE COURT: What brand is this?

BY MR. FREEMAN: This is the lazy A-K.

Cross Examination.

(BY MR. CARLETON.)

All I know about this lawsuit or this animal is that I simply lost one animal and went over to the agency and found it, with my brand on it and got my money for it. That is all I know about it.

LOUIS MONROE, sworn on behalf of the plaintiff testified in substance as follows:

Direct Examination.

(BY MR. FREEMAN.)

My name is Louis Monroe and I live at the head of Cut Bank on the Blackfeet Reservation. I live with my father. His brand is MF on the left thigh. I look after his cattle myself. My father was called up on the phone about two years ago last fall to see about an animal there in the agency corral and I went along. I didn't see the animal, my father saw it. I used the same brand as my father, the whole family has one brand.

Q. Did you sell an animal bearing the MF brand, could you when you wanted to?

A. I have to get a permit.

I can get the permit myself. I never sold any animal to the Petersons or to anyone else bearing

an RK brand.

Cross Examination.

(BY MR. CARLETON.)

I have the same brand and it is recorded at the agency and I sell cattle myself. When I sell my own cattle branded with my own brand I don't have to get authority from my father. I know Walter Peterson. I don't remember of selling an animal to him about the time I lost mine and getting \$18 for it. I know Oscar Boy. My mother does not speak English. I don't know of that animal being sold and my father being paid \$18 for it by Walter Peterson. My mother didn't tell me that. I didn't know that Walter bought some MF cattle. I wasn't down at the corral. I don't know anything about the cattle down there. I was up at the office. I didn't see this MF animal at the agency.

Q. Do you know it was there?

A. Yes sir.

Q. How do you know it was?

A. My father told me.

BY MR CARLETON: We move to strike out all the testimony of the witness on the ground that it was hearsay. Which said motion was by the court denied and defendant saved an exception.

FRANK MONROE, sworn on behalf of the plaintiff testified in substance as follows:

My name is Frank Monroe and I live at Cut Bank. My brand is the MF brand, on the left thigh, maybe, I don't know exactly. I forget whether it is on the right or left side. I went over

to the agency two years ago last fall to see about a cow of mine. I found a cow of mine there in the corral. I had never sold that animal. There was no brand on it. I couldn't make out what it was. It was on top of my brand. I never gave anybody permission to put any brand on my cow except the MF.

Q. How long before you found this cow over at the agency had you lost her if you remember?

A. Quite a while ago.

I live fifteen miles from Petersons.

Cross Examination.

(BY MR. CARLETON.)

I am sixty-eight years old. The new brand that I saw on my cow was on top of the old brand and a little to one side. I couldn't make out the new brand that was on my cow. I know Walter Peterson, sitting here. I have a son Louis who has just testified. Louis sells his own cattle. I don't know that Louis, my son, sold this very animal to Walter Peterson. He didn't tell me that.

Q. Do you remember when you testified about this at the other trial?

A. Yes, sir.

Q. Were you asked this question and did you give this answer at the other trial: "Q. Didn't Louis tell you he sold this cow to Walter about a year ago? A. I can't tell; I don't know that."?

A. Yes, I didn't give it to him.

I have been losing cattle right along. All I know about the defendants here having anything to do

with this animal is that I simply lost it and I went over the Agency and found it with the other brand and the agent gave me my money for it that is all I know about it.

JOE TATSEY, sworn on behalf of the plaintiff testified in substance as follows:

Direct Examination.

(By MR. FREEMAN.)

My name is Joe Tatsey and I live on the Black-foot Indian Reservation, about thirty-five miles south of Browning. I am acquainted with Charles Peterson and know where the Petersons live. They live about sixteen or eighteen miles north of Browning. It is approximately fifty miles from their place to my place. My brand is JT on the left shoulder. When I was called to the agency about two years ago last fall, I found a cow and a calf. The JT brand was on the cow and also Peterson's brand. There was no brand on the calf. I had never sold that cow to anyone before nor given anyone permission to drive it away from the ranch. I had not give anyone permission to put any other brand on it particularly the Y—K. That was my animal I found there. I don't remember how long it was since I missed the animal. I have some distinct recollection of the animal now as I saw it there. At that time I had other cattle running there on the range. They had ranged close around my place.

Cross Examination.

(By MR. CARLETON.)

All I know about this case is that I lost this

animal and went over there and found it with some Peterson brand on it and got my money for it.

Q. You never blamed the Petersons at all in connection with the matter did you?

The court sustained an objection to this question and counsel for the defendants then and there duly excepted.

All I did was to go over there and identify my animal and get my money.

PHILLIP FLAT TAIL, sworn on behalf of the plaintiff testified in substance as follows:

My name is Phillip Flat Tail and I live twenty miles south of the agency on the reservation. I know Charles Peterson, he lives on the north side, quite a ways from my place, I don't know how many miles. I look after my father's brand there on the reservation. I can tell you this brand if I see it.

on it. (Counsel shows witness paper).

A. That's it.

My father's brand is on the right shoulder. My father is dead. I was called over to the agency about two years ago last fall in connection with an animal having my father's brand on it.

Q. What did you find when you got over to the agency corral?

A. Found a cow, an animal.

Q. Was it a cow or a steer?

A. Steer.

Charles Peterson's brand was on the steer. If you showed me the brand I might be able to tell you

the name of it.

Q. This brand I show you (showing witness paper.)

A. That is the brand.

I never sold the animal nor gave anyone permission to drive it away. I never gave permission to anyone to put this Y—K on it. The animal was a year old when we missed it.

Cross Examination.

(By MR. CARLETON.)

All I know about this animal is that I lost one or my father or family lost one and I went over there to the agency and found it and got my money for the animal; that is all I know about it.

ALBERT GOSS, sworn as a witness on behalf of the plaintiff, testified in substance as follows:

Direct Examination.

(By MR. FREEMAN.)

My name is Albert Goss and I have lived at Browning twenty-two years. With Joe Brown and some other men I went out to the Peterson ranches along the last of October, 1910 for the purpose of making a roundup. The first place that we went to Mr. Lytle and a man by the name of Joe Coyle went with me; we came back from there to the north fork and then we were all together there. We didn't see any of the Petersons at the North Fork ranch, not until we came back to the home ranch. There was there at the home ranch at that time Mitchell and Walter Peterson, who were in the field. I didn't go into the house.

Q. What did you do with the cattle that you gathered at these places?

BY MR. CARLETON: We object as to all cattle except those in controversy here.

Which objection was by the Court overruled and counsel for the defendant then and there duly excepted.

A. We took them to the agency.

I think there was somewhere along about eighty head I guess in that bunch that we took to the agency. After we got to the agency we ran them through a chute in order to identify the brands upon them.

Q. Who was it that ran them through the chute, who was present?

A. Joe Brown and two of the Peterson boys, myself, Matt. Lytle, Joe McKnight and Malcolm Clark. Joe Brown took down the list of brands as they went through the chute.

Q. State whether or not there was any difference of opinion between all of you there including the Petersons as to the brands that were upon these animals and which Joe Brown put down in his book?

BY MR. CARLETON: Objected to as incompetent, irrelevant and immaterial.

Which objection was by the Court overruled to which counsel for the defendant duly excepted.

A. There was no difference of opinion.

Mitchell and Walter Peterson were working in the field at the time I went there. We stayed be-

hind to bring up a little bunch we got at the North Fork. These cattle were inside of the field. They call the ranch on the south fork the home ranch.

Cross Examination.

(By MR. CARLETON.)

I don't know anything about the branding. Joe Brown, Matt Lytle, myself, and there were several others around, I don't remember their names. Mitchell and Walter Peterson were there at the time the cattle were clipped in the corral. They were all there together assisting in the work, as readily and cheerfully as anybody else and there was no trouble among any of us. When the cattle went through the chute the hair would be clipped off and that would reveal the brand. As the brand was disclosed Joe Brown would put it down. I don't want to be understood that there were eighty head down there. I remember what I testified to before, at the first trial. My memory would be better then than now. When we went down there to the home ranch we found that bunch that the Major sent us out to gather. Joe McKnight was with me when I came to the home ranch. I rode down there in the daytime and found Melvin Peterson and the other Peterson boys there, all three, Mitchell and Walter. They were working cattle out in the field, some of the very cattle I took over. It was broad daylight and the field was in plain sight of the road, anybody could see it. I don't know that they were trying to hide anything in that field. I am an Indian. I was there at the home ranch on this

occasion with this man about three hours.

Q. What were you doing all this time?

A. Holding the cattle.

We drove a whole bunch in there. We drove in eight or ten head in there which we got on the North Fork. These were cattle with the Peterson brand. We were after nothing except those that bore the Peterson brand and other brands. I took everything of that kind I found. When Walter and Mitchell saw me and Joe McKnight I didn't talk with them about this stock, never said a word. I didn't ask them what they stole this stock for. They didn't ask me what I was there for. They were not talking to me at all.

Redirect Examination.

(By MR. FREEMAN.)

At the time I got to the home ranch Joe Brown and some of the rest of them were there ahead of me. I and McKnight came up from the North Fork with a small bunch and met the balance of the boys there and from thereon we were all together and drove the cattle over to the agency.

MATT LYTLE, sworn as a witness on behalf of the plaintiff testified in substance as follows:

Direct Examination.

(By MR. FREEMAN.)

My name is Matt Lytle and I live at Blackfoot and am a stockman and have been engaged in the raising of both cattle and horses. I was one of the parties sent out to round up cattle with the Peterson brand in 1910. I went with Joe Brown. I

went to the north fork ranch, next to the Canada line with Mr. Doyle and Albert Goss. Mr. Doyle is dead now. I didn't get any cattle at the North Fork ranch. I didn't see anybody there in charge of the place. From that place we went to the North Fork.

Q. Who did you find there?

A. I don't know his name.

There was somebody in charge there. None of the Petersons were there. We gathered some of the cattle that we were sent out to gather at that ranch, nine or ten head. From the North Fork we went over to the South Fork. From the North Fork to the South Fork is twelve to fifteen miles. The South Fork is called the home ranch. There we found Joe Brown and the Peterson boys. I remember Walter was there, and other Peterson boys were there but I don't remember which ones. When I got there they were just eating dinner. Cattle were rounded up there. These cattle that we rounded up there we cut out what we wanted of them and took them to the agency. I helped drive them all the way, Robert Goss assisted me in driving them. Dave Claire was with us. When we got to the agency we put the cattle in a chute and clipped them. While we were doing that Albert Goss, Joe Brown, Dave Claire and a couple of Peterson boys, I wouldn't say which ones, but I remember two of them, were there at the time.

Q. What have you to say as to whether or not you all agreed as to the brands that were upon these

cattle as they went through the chute.

BY MR. CARLETON: Object as incompetent, irrelevant and immaterial.

Which said objection was by the Court overruled and counsel for the defendant then and there duly excepted.

A. They all agreed on the brands.

Joe Brown put the brands down.

Cross Examination.

(By MR. CARLETON.)

I know Sol Davis or William Davis. I couldn't say whether he was there or not. I would know him if I saw him. I know Douglass but I couldn't say whether he was there or not, but I don't think he was. I might have been there at some time when Davis and Douglass were there with reference to what brands were on some of these animals. I said I took to the corral seventy-five or eighty head. As near as I remember that is the number I gave you at the first trial. I don't exactly recall that all of us agreed on the first trial that there were sixty-seven head, the same number that Mr. Brown gave us yesterday when he was on the stand. We ran the bunch through the chute to determine the brands, the whole bunch. By running the whole bunch through you could clip off the hair and then readily determine the brand.

Q. Are you positive about that?

A. Yes sir we ran one through at a time.

I have a distinct recollection of running them through when I was there. From that distinct

recollection I could tell you whether a count was kept of the number or not. I don't remember what the count did show, every head of cattle was run through the chute.

Q. Isn't it a fact that some were not run through the chute at all and you so stated at the other trial?

A. There might have been.

Q. Do you know now?

A. No sir.

By cattle milling is meant running around and getting wild and ugly. These cattle got wild and ugly and began to mill before we finished chuting. I don't remember whether those that got wild and ugly were run through the chute or not. When we came down to the home ranch we found someone eating dinner and they invited us in and we had our dinner. Billy Haggerty was with me. We stayed in the field there until we got through working, about an hour, maybe two hours. We were cutting out cattle, cattle that we were sent out for, those that bore other brands than the Peterson brands. The Peterson boys assisted us. This field is close to the public highway where everybody could see what is going on. I am an Indian, and belong to the tribe and am carried on the rolls. I heard no talk with reference to the object of that bunch of people coming down there. The boys made no objection to helping me cut them out. All I know about these animals described in the indictment here, some sixteen or seventeen, is that I found them down there bearing the Peterson brand. I don't

know under what circumstances they came there or how or why, I don't know anything about that.

JOE BROWN, recalled for further testimony on the part of the plaintiff testified in substance as follows:

The cattle that I decribed on my redirect examination as one steer branded 25 on the left ribs, the property of Calf Looking, was what is known as ID stuff. The ID brand is on that. The same is true of a cow branded 17 on the left ribs the property of Bad Marriage, and likewise the animal branded TS on the left ribs; the property of Catches Two. Likewise the cow branded \overline{OO} on the left hip, the property of Henry No Bear; also a cow branded O on the left thigh, the property of Little Buffalo Stone. There were no permits issued for the sale of any of the property you have just described to me.

Q. What does ID stuff mean, what brand?

A. That is the Indian Department brand.

It means stock which has been issued by the Indian Department to the Indians and covers the increase of that stock.

Cross Examination.

(By MR. CARLETON.)

The book that I testified from shows this ID stock in all cases.

JOHN BOSTWICK, sworn as a witness on behalf of the plaintiff, testified in substance as follows:

My name is John Bostwick and I live on the

Blackfeet Reservation and am a member of the tribe, and was living there in the year 1910. I am acquainted with the defendants Charles Peterson and his two sons and have known them off and on all my life. I did work for the Petersons during the year 1910. I started along in September and quit in October, working about six weeks on the roundup. I rode on the roundup then.

Q. I will ask you to state whether or not you drove to the Peterson ranch in July, whether you sold to any of the Petersons in the month of July some cattle?

A. Yes sir.

I sold these cattle at Browning, to Mitchell Peterson, the transaction involved four head.

Q. And who were you paid by and how much?

BY MR. CARLETON: We object unless it is shown that they are cattle that are described in the indictment, otherwise the question is irrelevant and immaterial.

BY MR. FREEMAN: This is relative to the fourth count.

COURT: Overruled.

MR. CARLETON: Exception.

I was paid \$130 by Mitchell Peterson and I gave him \$10 back. He paid me by check, signed by his father. Exhibit "D" which you show me, is the check. There wasn't any conversation only I said I wanted to sell the cattle and he said all right. There wasn't any conversation that I can remember of with Mitchell Peterson concerning the subject

of the sale of these cattle before this time in July. That was about the 4th of July, I don't remember anything before that. I don't remember the brands of the cattle at all.

Q. Remember anything concerning the Bryan Connelly steer?

A. That was picked up on the roundup several months after that.

This Bryan Connelly steer was picked up on the roundup two or three months afterwards and his brand was on there and Mitchell told him he got the steer from me. He fetched the steer down there and asked me if I sold it and I said I didn't know. After Bryan Connelly brought the steer down I had some conversation with Mitchell Peterson concerning this Bryan Connelly steer. I went there and asked him if Bryan got the steer out of his herd and if Bryan had claimed that they had got the steer from me and he said yes and I said let him have the steer back and I will make it right with Mitchell. There was talk also about the Joe Cobell steer. The talk was about the same. Mitchell claimed that was one I gave him on the 4th of July and I got it back and I allowed Mitchell sixty dollars for these two steers. That was on the roundup, I don't know the date. It was sometime while I was working for the Petersons.

Q. Where did you get these four head of cattle that you sold to Mitchell Peterson as you say?

An objection to this question was overruled and defendants excepted.

A. I picked them up on the range and sold them to Mitchell. I didn't purchase them. I helped brand these cattle. I think it was the same day that we branded them, he bought them just above Browning. I think Oscar Mitchell and somebody else was present at the branding. I guess Charles Peterson was on the home ranch at the time that he gave this check to me. I didn't see him. He lives 18 or 20 miles from Browning. I sold this one to Mitchell Peterson the same day I got the check. I wouldn't say for sure what brands were put upon these four head of cattle at that time, but I think a DP and UJ. I couldn't say that they were evenly divided. The UJ brand I think belongs to Mitchell and the DP also I think, I wouldn't say for sure. I remember after the fore part of July of disposing of other property to the Petersons in the month of July, the latter part, there were seven head. I picked these cattle up on the range on the south side. After I picked them up I took them to the Peterson ranch and sold them, to their home ranch. Miles Running Wolf assisted me in driving these cattle, I got Miles at Browning. He didn't have anything to do with picking up the cattle, I picked him up in Browning on Sunday morning. I brought the cattle into Browning myself. I didn't purchase any of these cattle from anyone. I simply gathered them up. When I went to the Peterson ranch Mitchell and the old man was there, and I think Walter and Oscar. I just brought the cattle there and told Mitchell he could buy them.

He said he would see the old man and he saw him and said the old man said he would take them. The old man paid me. I don't think I had a conversation with Charles Peterson. There are several ways of going to the home ranch of Charles Peterson. I went in through the southeast side of the ranch. I didn't meet anybody before going there. When I got to the place I put the cattle in the corral. This times Miles corraled them, the other boys were there but we didn't need any help. Miles helped me put them in the corral and the other boys came there and I don't remember Oscar or Walter or Mitchell. We put our horses up as I wanted to go back to Browning that same night. I don't know whether we had supper before we left or not. They branded before I left. I don't know whether it was before or after supper that I made the bargain, it seems as though it was after supper. Mitchell just went down and looked at the cattle and wanted to know what I wanted for them and I told him and he said alright that the old man would take them, I don't know whether it was before or after supper, anyway, along about that time. We branded the cattle and after we got through I went back to Browning.

Charles Peterson gave me a check for them. I don't just remember the amount of the check, but I think it was \$210. Government's exhibits "E" and "F", which you show me, I guess are the checks, I don't remember whether there was two but I guess there was though. The date of these

checks is August 1, 1910, must be along about the time I got the checks at the time I took the cattle there. I think the reason was that I got two checks that I told him to give me as small checks as he could because I couldn't change them in Browning. I don't remember now what brands were on these seven head of cattle that I took there the last part of July, 1910. I might remember the animals if they were read out to me, but I couldn't give the brands now. On this bunch of cattle that I sold in July I didn't give Mitchell any bill of sale of any of the cattle I sold the last of July. I didn't deliver to him any permits issued by the superintendent of livestock for the transfer of sale of personal property on the reservation. Nothing was said by me to Mitchell or by Mitchell to me about a bill of sale. He didn't ask for a bill of sale.

Q. Did he make any inquiries as to where you got this property.

A. Well he just asked me and I said, over on the south side, that was all I told him.

Nobody took a list of the brands on the first of July unless Mitchell took them himself. I didn't notice whether he did or not. When I turned this property over to him I didn't turn over a list of the brands of the property. On the last of July, I think Oscar and Walter were present and Mr. Peterson himself. I and Oscar did the roping. I think Mitchell did the branding. I don't remember what brands were put on these cattle. I know the Petersons' brand generally, they have six or seven

brands, but I don't know what they put on, but someone of the Petersons' brands. I don't remember whether or not any list of the brands was taken by any one when the branding was done there on the last of July. At the time Mr. Peterson gave me this check for \$210 he didn't ask for any bill of sale. He didn't ask me whether or not I had permits from the Agent. I didn't give him any bill of sale, nor did I deliver to him permits for the sale of this property. There was nothing said to me there by anyone at that time as to what brands were upon these seven head of cattle I delivered at that time to him. After the 29th or after the last day of July, 1910, I drove other cattle to the Peterson ranch, it must have been the latter part of August sometime. There were 16 or 17 head in this bunch, I think, which I had got on the south side of the reservation. Mose Henault assisted me in driving them to the Peterson place. He had nothing to do with the picking up of the property out on the range. I simply hired him to help me take them out. We came in on to the Peterson ranch on the southeast side. It must have been along about two or three o'clock I guess, when I got to the Peterson ranch with this bunch of seven head that Miles Running Wolf assisted me in driving in. That's what I say, I got there along about two or three o'clock and I might have branded them before supper, I wouldn't say which, but we branded them before I left there; that evening I left there and went back to Browning.

Q. Didn't you get there along a little later in the afternoon?

A. Well, it might have been a little later than three or four o'clock.

We branded about two or three o'clock, it might have been later. We arrived with this bunch of seventeen head along in the evening sometime. I met Walter Peterson before going to the Peterson ranch, up on the hill, he was driving a horse into the pasture. Nothing took place then, he just fell in with us as we were taking these cattle to the ranch. When we got to the ranch we put them in the corral, Mose Henault and I guess Walter might have helped me. After we put them in the corral we put our horses in the stable and fed them. I don't know whether we went back to the corral or not. I saw Mitchell there sometime, I don't know if we had supper first or not. I made a bargain with Mitchell and sold him the cattle and Mr. Peterson paid me. That was after supper and then I went home. Charles Peterson paid me for the cattle, \$350. He owed me \$150 on the cattle then. I think government's exhibits G and H, which you show me, are the checks given me by Charles Peterson on that occasion, dated August 30, 1910, each for \$175.

The reason for the two checks was that I didn't want them too large. I wanted three and he said he only had two blanks left. Some of the 16 or 17 head I drove there upon that occasion I bought, I guess about half of them, but I don't just re-

member, how many. That would mean about eight that I simply picked up on the ranch. I can't remember the brands now that were on those cattle that I took there the last of August, 1910. I made no list of the brands at the time. Before the time I sold these cattle I had not delivered any bill of sale to Charles Peterson nor did he ask me for any at the time nor for any permits. He didn't ask me where I got them. I didn't tell him anything. I didn't stay for that branding, I think I figured it out that evening. I didn't want to stay because I wanted to go home and it was getting toward evening. With reference to this delivery when he paid me the \$350, he told me he was a little short and wanted me to let him off for that amount and I told him that was all right with me. I went to work for the Petersons on the 6th or 7th of September. I made the arrangements to go to work for them about a month before, with Walter and Mitchell and I think the old man too. When I went to work for them we didn't set any price but they paid me \$60 for the six weeks. I was present at the corral there on the Peterson home ranch about the 21st of October, the time when Levi Burd came there while some cattle were being branded.

Q. Tell us where these cattle came from that were in the corral on that occasion?

A. They came from the roundup.

At this time there were 6 or 7 head, I think, something like that, that were in the corral at that time. I remember a steer in that bunch branded

25 on the left ribs, which I had fetched from the other roundup.

Q. Whereabouts on the roundup, who was with you?

A. Oh I can't remember, there was fifteen to twenty riders riding,—over near the railroad.

Q. Do you remember among that bunch a cow branded 17 on the left ribs?

This question was objected to as outside the issue in the case, which objection was overruled and defendants excepted.

A. Picked her up on the roundup.

I don't just remember where I did pick up that 17 cow. There were 5 or 6 other animals in that bunch that I picked up there upon that occasion. I picked them up on the roundup. We picked up everything what were strays. I remember a cow branded TS on the left thigh, the property of Catches Two.

Q. Where did you pick up that animal?

A. That was picked up on the roundup.

Q. A cow branded \overline{OO} on the left hip, the property of Henry No Bear.

A. Picked up on the roundup.

The roundup quit along about the 18th or 19th of October, I think. These four head of cattle that you have described were left at the time the roundup quit in Levi Burd's field.

Q. What other cattle was in there at the same time?

This was objected to as incompetent, irrelevant

and immaterial. The court overruled the objection and defendants excepted.

A. Peterson cattle, Haggerty cattle and other cattle that was rounded up on the roundup, everyone's cattle.

These cattle were taken out from the field by all the different owners coming down there and rounding up that field and cutting out their stock. Wetzel, Burd, Haggerty and a hired man by the name of Albert Hall cut out what belonged to them. When they went to the field Mitchell, Melvin and Walter Peterson went also We four fellows rounded up the field and cut out Peterson cattle and the others cut their out. We cut out these four head of cattle which were in with the Peterson cattle.

Q. Were there any besides these four head with the Peterson cattle?

A. Might have been, 6 or 7 head of cattle in there at that time.

I don't think we did put any of the cattle in the corral at that time, we had the Peterson's brand.

After we got home the Peterson cattle were put in the field. We threw these other 6 or 7 head in the field with the Peterson cattle. Then we went out that afternoon and rounded up the lower side of the Peterson coulee and picked up some more. It was the next day I believe that we put these 6 or 7 head in the corral, after they had been brought over from the Burd field. When we brought them over from the Burd field we threw them in the Peterson field. We went home that night and the

next day came down. Then we gathered up the field and cut the cattle we wanted to brand and branded them, the cattle the Petersons wanted to brand. I had some to take home that belonged to some Indians up above there. As a matter of fact I put about 7 head in the corral the next day after I got back. These were all branded after we got them into the corral. I don't know what brands were put on them. I think DP and UJ, maybe a Y—K, I don't know for sure. With reference to these 6 or 7 head of cattle that were rounded up in the corral and branded at that time, I just told Mitchell I wanted to sell them to him. He said all right. There were some 6 or 7 head, and I think they had some in there they had bought from somebody else that they wanted to brand, one or two of Melvin's I think. The old man paid me. Government's exhibit L I guess is the check that was given me by Charles Peterson on the occasion of the sale of this 6 or 7 head of cattle. It is a check for \$65.00, signed by Mitchell Peterson, but Charles Peterson gave it to me. At the time that I delivered these cattle or branded them I didn't deliver to Mitchell Peterson or to any member of the Peterson family a bill of sale nor any permits. No one asked me for a bill of sale or for any permits. At the time these cattle were branded I think I and Mitchell did the roping, and I think it was Walter who did the branding. I think Melvin was there. I don't know whether or not any list of brands of these cattle were taken. I don't know whether

Charles Peterson on that occasion had a book in his hand or not, but I think he was outside of the corral, handing in the irons. At the time I took this 16 or 17 head there wasn't any list taken of the brands at that time that I know of. I wasn't there when they were branding them.

Q. Can you give us a description of any other cattle of this 6 or 7 head branded there on the 21st of October besides the 25 and the 17 and the TS and the $\overline{\text{OO}}$?

Objection to this question on the ground that it is incompetent and leading was overruled and defendants excepted.

A. Yes, an R steer I think, and an MW cow, and the T anchor P steer.

I first saw the T anchor P steer in Burd's field. was working the herd down there and I saw that he had a dim brand on him.

BY MR. CARLETON: We object to all testimony regarding this steer as outside of the issues in this case.

Objection overruled and defendants except.

A. I noticed it had a dim brand on and I couldn't make out what it was and I think I called Melvin to look at him and he couldn't make it out either. Anyhow there was a dim brand. I wanted to see what it was so we cut him out of the herd and throwed him to see what it was and either me or Melvin, don't remember which one of us took him on over to the ranch and put him in the other herd. He kept lagging back of the bunch, was

kind of a lazy steer and we noticed him. Someone in the bunch kind of asked who owned the steer and I spoke up and said I did.

BY THE COURT: Who was the bunch?

A. Well, there was Paul and Melvin and Walter and myself and Mitchell.

Before that took place Mitchell had went in the coulee with Levi Burd to get this R steer, it was lost up in some coulee and he caught up with us after they got it. He turned the R steer in with the balance of them. This steer was lagging behind and someone asked who owned this steer and I spoke up and said I did. The brand had not been examined on that occasion. I said I owned him Mitchell says, I think, "what do you want for him," and I told him \$15. He asked me what he had on him and I told him I didn't know. I told him we will go down to the field and throw him and see what he had on him. We examined him and saw it was a T anchor P steer and let it go, after we saw what it was. We let it go because we didn't want to bother with it, seeing we knew who owned the steer, until the next day, and then we took the steer the next day, the next day after we throwed it in the field, we got thinking it over and thought it looked easy and we would take him. The T anchor P brand belongs to Dave Pambrum. Nothing further was said about the T anchor P steer at that time; we let him go then. The next day we were cutting out these other cattle and this steer was standing on the edge of the herd there and we talk-

ed about him; myself and Mitchell. I don't know what we did say. Mitchell says "what about this T anchor P," or something in regard to the steer and I said, "If you want to take a chance on it we will call it square on this \$18 I owe you on the blackjack game." I says "If you want to take a chance we will take him and call it square and if anything comes up I may be able to fix it anyhow with Dave." I square up the blackjack game with Mitchell with this steer.

Dave Pambrum lives about four miles below Browning and I am well acquainted with him and so is Mitchell. I didn't have any conversation with any of these defendants with reference to this R steer, only to cut him out of this herd and brand him.

Q. Going back to the time when you got those two steers, one belonging to Joe Cobell and the other to Bryan Connelly, on what basis did you make this good?

A. Sixty dollars.

Q. How did you settle for that with the Petersons?

A. Well they owed me a hundred and fifty dollars. I just took sixty dollars off that one hundred and fifty.

Q. How long was that straightened up before you quit working for them?

A. Well that was during the time we was on the roundup the first time they found these two steers. Had been out three or four weeks.

This was about two or three weeks before the roundup disbanded.

Q. Did you ever have any understanding with Mitchell, during July and August, any sort of a general understanding about the purchase of cattle from you?

A. No, not in particular.

Q. Well what was ever said by either of you or he concerning that matter?

A. I don't know as anything was said that I remember of. I never said anything to Mitchell concerning these different bunches of cattle generally as to where I got them.

Q. Well didn't you have some conversation about some of this stock as to whether it was right or not?

A. Well as to the last bunch there might have been something said.

Q. But was there anything said by you or anyone else?

A. I can't remember how that came up. I don't remember whether there was or not.

Among these several bunches of cattle that I delivered to the Peterson ranch, I have already testified that there was a T anchor P steer, and there was also an MW, which was delivered in the last bunch. I bought that cow from Miles Running Wolf. The steer branded 25 on the left ribs, was also in the last bunch; also a cow branded TS on the left hip.

Q. Steer branded lazy FY on the right hip?

A. I don't remember that one.

Q. Do you remember a steer branded 7 P bench E on the right hip?

A. I think I remember that, that isn't the last bunch.

I don't remember an animal branded CE on the right shoulder as being in any of these four bunches of cattle that I delivered there; I remember a cow branded A P lazy S on the left hip, which was among one of the four bunches. I think a cow branded 30 on the right hip was one of them. I don't remember a cow branded $\overline{12}$ on the left shoulder. A cow branded \overline{OO} on the left hip was one of them; also a cow branded R on the right shoulder.

Q. Isn't that the same one that we called a steer? That is the R brand isn't it?

A. Yes sir.

This was a different animal than this R steer I speak of. A. YP steer on the left hip I think was one of them, I am not sure.

Among the cattle delivered in these four bunches there was a cow branded O on the left hip, also a cow branded 17 on the left ribs. I don't remember a CZ on the right shoulder. There was also a cow branded $\overline{21}$. I don't remember the 23 steer on the left hip, nor a steer branded JT or DT on the left shoulder. I plead guilty to the offence of stealing these cattle that I have testified about here. In 1910, and previous to that time my business on the reservation was riding generally.

I had no place of my own previous to that time, I made my home at my brother's. I live 5 or 6 miles west of Petersons.

Cross Examination.

(By MR. CARLETON.)

I was not born on the reservation but have lived there going on 15 years now. I make my home with my brother, Frank Bostwick, and have had my home there all this time until this last year. My brother lives five miles from the Petersons.

Q. You were neighbors and friendly?

A. Friendly.

I had known the Petersons a long time. I hadn't stolen any stock previous to the time mentioned by Mr. Freeman.

But I had dealt with stock. I had never been accused or arrested for stealing stock before these times. At the times mentioned by Mr. Freeman I had deposits in the Kalispell National Bank, and I issued checks on that bank. I am 38 years old and unmarried. My brother is a married man and has a family. I mentioned that I bought cattle of Miles Running Wolf and paid for them. I had no permit for that nor did I give any bill of sale for that, I got the animal in a trade. I sold it to Mitchell Peterson and I didn't give him any bill of sale and he didn't ask me for any. This deal was perfectly straight and honest. There were a number of other cattle the same way.

Q. And he didn't ask you anything about that?

A. No sir.

Q. Was the transaction any different as to these that were straight than those that were not?

A. No sir.

Q. Was there anything in the transaction as far as you knew that would lead Charles Peterson to suspect that any of these others were stolen any more than the Miles Running Wolf or others that were straight?

A. No sir.

With reference to Walter it was the same and with reference to Mitchell it was the same, except the blackjack game steer.

My testimony is that there were four several bunches of cattle sold at four different times. I never in my life sold an animal to Walter Peterson or had any dealings with him about cattle. I never received a cent from Walter Peterson for any of this or for any stock. He had nothing to do with these cattle as to their purchase or payment, nor was he connected with the transaction in any way so far as I know. I am the man that handled them and sold them. I hadn't any partner in the transaction so far as stealing them or selling them was concerned. I had sold cattle before the times mentioned by Mr. Freeman to different people.. Had sold to a man by the name of Wetzel and had had trouble over them. I had also sold some cattle to Levi Burd and bought some from him and never had any trouble about them. This was before the Peterson cattle transaction. There were also a number of others with whom I had business trans-

actions of that kind before I had had these transactions with the Petersons. I never had any trouble at all about them. Nobody made any complaint so far as I know. The first bunch were sold at Browning somewhere about the 1st of July, 1910. I don't know what character of cattle they were. They were delivered there and turned over to Mitchell in the town of Browning. That transaction was had with Mitchell. He was the only one of the Petersons with whom I had any dealings concerning that transaction. There were four head of two year old steers in that bunch and I was paid \$30 a head for them or \$120 for the four. That was a fair price for the cattle. So far as Mitchell Peterson knew that transaction was just as straight as the one with reference to the Miles Running Wolf animal. There was nothing said or done by me to put Mitchell on his guard as to the animals. The time of this transaction was about the Fourth of July, I wouldn't say for sure.

The second delivery to the Petersons was along about the 30th of August. There were 7 head in that bunch. I guess these were all ages, cows and steers I think, I don't remember the number of each. I received for them \$30 a head, \$210, as shown by the two checks which I have identified. That was a fair price for those cattle.

Q. You wouldn't expect to get any more if you had raised them yourself and they were absolutely your own?

A. I might have bought them for ten and sold

them for twenty.

Q. You wouldn't have expected to get any more if you had owned them, at thirty dollars ahead?

A. Not if I sold them on the Reservation, if I sold to a buyer I might.

I assisted in delivering those 7 head at the ranch. The bunch of four were delivered at Browning, and were branded there. They were branded in broad daylight, only about one-half a mile from the agent's office, where anybody could see us. There was no concealment about the branding. I helped deliver the bunch there. Miles Running Wolf was with me. The cattle were in the corral right near the public highway, where everybody could have seen them if they noticed the place, and anybody passing there could see the cattle. There was no attempt to conceal them on the part of the Petersons, everything was done in the broad daylight.

I was paid in full and that transaction was closed. The amount paid, \$210, I say is a fair price. The Petersons brought the four head out from Browning themselves. The seven head were branded out in the field. The third bunch was a bunch of 16 or 17 head. The sum that I received for that bunch, which was \$500, was a fair price. This price I guess averaged about the same as the other bunches. I received in payment two \$175 checks, which I have identified, leaving a balance of \$150 unpaid on that purchase. I tell you that they were two steers, one of Cobell's and one of Connelly's

which were taken away and there was deducted from that balance of \$150 that Peterson owned me the sum of \$60 allowed for the two steers. That left a balance of \$90 due me. I subsequently had a settlement with Mr. Peterson for the balance of \$90 so that it was all squared up. I worked for Mr. Peterson a while. I received other payments, of money from him besides the \$60 in wages, upon that account until it was finally all paid.

Q. And the whole matter was satisfactorily adjusted according to your agreement for the \$500?

A. Yes, sir.

The transaction concerning the fourth and last bunch was about the 20th of October, 1910. In that bunch I think there were six or seven head, but I am not positive which. If I stated at the other trial there were six, my memory would be better then about the matter than now. Just as I said, we got this bunch out of the Burd field. The cattle were of average age.

Q. What was the contract price for this bunch?

A. I think two hundred and fifteen dollars.

I aimed to get all they were worth and I think I did.

Q. You were paid in full and settled for that bunch?

A. Yes, sir.

Q. So independent of the ownership of the cattle whatever the contract price was you were paid in full?

A. Outside of that blackjack steer.

Q. Because you let that go to square that debt of Mitchell's?

A. Yes.

Q. Taking that into consideration the settlement was made in full and on the square for all the four different bunches?

A. Yes sir.

Q. They didn't owe you a cent?

A. No.

I don't think that Charles Peterson had anything to do with the roundup of any of these cattle or cutting any of them out. He wasn't out to the herd.

Q. Wasn't on the roundup at all?

A. No sir.

He had nothing whatever to do with it, if he had been there. I would have recalled it. The roundup in Burd's field was during the end of the roundup, along in October. These roundups occur in that country about twice a year. The purpose of the roundup is to get the stock all together and round it up and sorted out, so that the owners can get their own cattle. I can't state the names of all the people that were there on the roundup, but there was Levi Burd, Wililam Haggerty, Mitchell Peterson and Bryan Connelly. With reference to the branding, I testified to some of these cattle. As a stockman I am familiar with the method pursued when a person buys cattle of another with a different brand from his own. The purchaser vents the old brand on such occasions, and

then he put on his own brand.

Q. Was there any difference in the handling of this stock that was stolen and which you sold to the Petersons, and that which you honestly bought and paid for and sold to the Petersons, as to the venting and branding of the cattle?

A. No sir.

The old brand on the cattle was not blotched or tried to be disfigured in any way. The new was put on where anybody could see it. The old brand was apparently plain to be seen, it was just the same after the rebranding as before. Those cattle which were crooked were picked up anyways from 25 to 50 miles from the Petersons, over on the south side of the reservation. It was all the way from 20 to 50 miles off beyond the roundup of the Petersons entirely.

As to the fourth and last bunch of cattle which I sold to the Petersons, that was a lot of cattle rounded up and thrown into Levi Burd's field. That field is right east of the Petersons, I don't suppose over two miles distant.

Q. Who were the persons assisting in putting the cattle in the Levi Burd field?

A. I don't know. Levi was one of them.

Levi Burd was the owner of this field. There was some other one up there with me.

Q. How many all together assisted in getting the cattle into this field.

A. I don't know. I think Billy Haggerty.

Q. Whose cattle were they that were put into

that field?

A. A little of everybody's.

Q. That was nothing unusual?

A. No sir.

Q. What was the purpose of that?

A. Well, the cattle that belonged there we put them in there so that the people that owned them could come and get them.

I guess there were all of a hundred head of cattle put into the Levi Burd field. There might have been more. They were put into that field in the day time. I was working for the Petersons at the time, and had been working for them nearly six weeks. I continued working for them three or four days after that. I couldn't say the time of day these cattle were put into this field, I wasn't there to help put them in. I was on the roundup. I simply knew that they were put in there by what was generally understood there. All these different persons assisted in putting them in, being put in, as I have said, so that the owners could come and get their cattle.

Q. Whenever they were put in there, you did come down there to the Levi Burd sometime after?

A. Yes, after the roundup.

Q. What did you go down there for?

A. I went down for cattle at the Petersons had in there, Mitchell, Walter and Melvin and myself and a fellow named Albert Paul.

Q. He had cattle there?

A. No.

Q. He was working for the defendants?

A. Yes sir.

My object in going down there was to cut out the Peterson cattle.

Q. That was perfectly straight, wasn't it?

A. Yes sir.

There was Billy Haggerty, myself, Mitchell, Melvin and Walter Peterson and Albert Paul in the Burd field cutting out these cattle the next day.

Q. Is that all you think of?

A. Levi Burd had a man or two there.

I say that we were working that field over half an hour or about that.

Q. Had the different owners got out their cattle and taken them away?

A. Yes sir.

Q. You and Mitchell and Walter, if he was there, and Melvin if he was there, cut out the Peterson cattle?

A. Yes sir.

We took them to the Peterson field, Charles Peterson wasn't there at all and had nothing to do with it. We cut out fifteen or twenty head of the Peterson cattle.

Q. Was that all straight in cutting them out?

A. Yes.

Mitchell Peterson didn't help us in cutting out the Peterson cattle there. He went up after this R steer.

Q. I am speaking of the very time they were cut out.

A. He was there but didn't do any cutting.

Q. By cutting out you mean separating them?

A. Yes sir.

Q. There was nothing crooked about this business in the Burd field?

A. No sir.

Q. It was after that then, after the cutting out in the Burd field that you did have some transactions with reference to certain head?

A. That was this here T anchor P steer.

Q. I want to locate it. How long after the cutting out where everything was allright in the Burd field was it before you had any transaction, if any, with Mitchell Peterson?

A. As we were taking these cattle up to the Peterson field.

Q. Everything was was all straight before that time?

A. You asked me how long after it was. Just about half an hour after.

This occurred as we were taking them up to Mr. Peterson's field and out of the Levi Burd field. No one was present when Mitchell and I joshed about that T anchor P steer.

Q. Was anybody present who could hear you talk?

A. Well, Melvin and Mitchell and Walter and Albert Paul and myself were there.

Melvin helped drive these cattle and I am sure that Mitchell and Walter were there. It might have been 15 or 20 head that we were taking over to the

Petersons'.

Q. Up to that time, Mr. Bostwick, if I understand you, everything was on the square between you and the Petersons as to the stock business?

A. Yes sir.

Q. Previous to that time you had not indicated anything to them or to Mitchell or anybody else that you had stolen stock or was going to?

A. No, not that I remember of.

I read my testimony at the first trial for the purpose of refreshing my recollection. Up to the last bunch of six head or seven, whichever it was, I never told Walter Peterson nor Charles Peterson that any of them were not right.

Q. The only person you ever did tell was Mitchell Peterson?

A. Yes.

It is a fact that out of the last bunch there were only one head that I told him wasn't straight, that one being the T anchor P steer.

Q. That was the only one that you wised him up to?

A. The only one that I can remember of.

Q. Will you just tell us once more about the T anchor P steer?

A. I was down there in the Burd field. It was in the Burd field when we went down there and I was working the herd and I saw this steer and it had a very dim brand on him and I sized him up couldn't make him out and called Melvin and asked him to make that out and he looked at it and

couldn't make it out either so we started on up with the herd and Mitchell and Levi Burd went over after this R steer. Mitchell caught up with us after we got two or three hundred yards from the herd with this R steer and this T anchor P steer was dragging behind and somebody in the bunch made the remark, "Who owne that steer", and I says, "I do", and when I said that Mitchell said "what do you want for him and I said fifteen dollars and he said, "What has the steer got on him," and I says, "I don't know". He said, we will wait till we get to the field and throw him and see." When we got there the rest of the boys went into the house and I and Mitchell took a rope and went and roped him an examined him and saw he was a T anchor P.

Q. What was said?

A. He said we had better leave him alone. I think it was the next day I came down there and just Mitchell was home then and this Albert Paul. I don't know where the other boys were. We cut the herd out and branded them and this T anchor P steer was standing on the side and we kind of sized him up again and I don't just remember what was said about taking a chance on him and I said "Yes if you want to take a chance it is a go with me and we will take a chance on the eighteen dollars that went in the blackjack game. We took a chance on him and that was the way the T anchor P steer came up.

Q. Could you explain to the court and jury

why it was necessary for Mitchell to pay you anything on that steer? He could have stolen him without your assistance?

A. Well he might have and he might have thought this was clearing him by buying it from me. I think he knew I didn't own the steer.

Q. If he wanted the steer, can you explain why it was when you threw him and found a brand on him you turned out and let him go,—and that Mitchell didn't want him because of that brand?

A. Only he might have thought he was getting it cheap at eighteen dollars, this being a gambling proposition.

That is the way it came up. I don't know that I have had any trouble with Mitchell. When this case was tried before I was in the Lewis and Clark County jail. Just before the case came up my attorney withdrew my plea of not guilty to both indictments and pleaded guilty for me. I had been there seven months in jail when the trial came up. I didn't know that I was going to withdraw my plea until twenty minutes before I did.

Q. You weren't told that your time was going on on your sentence while you were staying there in jail?

A. Well it didn't look like it, I put in about seventeen months and a half there.

I had talked with the people there in the jail about the trial. I never told them that my time was going on. I can tell you how that came up if you want me to explain it. I never told people there

that I was going to get even with Mitchell Peterson nor the inmates that I was going to Leavenworth and would take Mitchell with me. I didn't state that I had it in for him, or that he had rubbed it into me. I said I heard he was going to. I believe I did testify at the former trial that I would not cinch any man if I thought he was innocent. I am not trying to cinch Mr. Peterson, notwithstanding he has rubbed it into me.

Q. Then Mitchell, in your opinion, before that first trial, had rubbed it into you.

A. I say that up in Browning he testified against me.

Mr. Charles Peterson had known me at the time I was arrested for stealing that stock, ever since I was twelve years old and was well acquainted with me.

Q. And the boys the same way?

A. Yes.

Q. And you were brought up in the neighborhood with them?

A. Well yes, practically.

We boys together, back and forth a great deal. The old man was kind to me and knew me well and treated me well,

Redirect Examination.

(By MR. FREEMAN.)

Before I sold this last bunch of steers, or went through this form of selling them, I had settled up with the Petersons including Mitchell and Charles, for the two steers of Bryan Connelly and Joe Co-

bell. I simply took their word for it that the Bryan Connelly and Joe Cobell steers were among the bunch I sold them. I saw the steers, I saw those steers, but I don't know whether I sold them or not. Mitchell said that I sold them and I took it for granted that I did. I saw the two steers, the Bryan Connelly and the Cobell steer, with the Peterson brand on them. I had deducted the \$60 for them.

Q. The amount that was due. After that you sold to them this other six or seven head of steers on the 21st of October, a few weeks after that?

A. Yes sir.

Q. You took the first two bunches through Browning?

A. No sir. On the 4th of July was there at Browning.

I got these about fifteen miles southwest of Browning. There were many other cattle buyers on the reservation who were in the market for cattle. I didn't attempt to sell any of these cattle to anyone else. Some of these cattle I drove as many as fifty miles. I don't suppose there were a great many markets nearer to where I picked up these cattle than where the Petersons live. All the buyers live elsewhere. All the storekeepers buy cattle, but you can't get anything out of the storekeepers in the way of cash, all you can get out of them is in trade. There are several more buyers there of cattle on the reservation besides the Petersons. At the time I sold this last bunch of six

head, I got a \$65 check and the rest in money. I think every other time when I received money I got it by checks. Those are the checks that you have shown me here up on the stand, which I received for these cattle. He handed me this \$65 check.

Q. Was the balance between that and \$215 handed to you?

A. There was a \$65 check handed to me by Mr. Peterson and the rest in money, \$150 in currency.

This was in payment of the last bunch of cattle and also in payment of my wages, amounting to \$60. That transaction related simply to this 6 or 7 head of cattle and my wages of \$60 on the roundup.

On each occasion Mr. Charles Peterson handed me a check for the cattle. The 15 or 20 head of cattle that we took out of the Burd field on the last part of October, included the whole bunch.

Q. Were there in that bunch, taken out of the Burd field, the six or seven head that had been stolen?

A. No, I don't think they were all in there. The MW cow wasn't in there. I don't know if the OO cow was there or not.

Q. Where were they?

A. We had throwed them in the field there.

When we came to brand them the next day, we put in the MW cow. The Petersons ranch is about quarter of a mile from the road there. It is usual for cattle buyers to go into Browning to buy cattle.

Recross Examination.

(By MR. CARLETON.)

The cattle which I sold to the Petersons were not beef cattle. I wouldn't expect to take such stock as that to a store or to market and sell it for beef. Four of the five head of the last bunch I sold to the Petersons were got out of the Burd field. The T anchor P steer was one of this number. That is the only one that I can just now remember that we got out of the Burd field, which was in the last bunch of six or seven head sold to the Petersons.

Redirect Examination.

(By MR. FREEMAN.)

Q. When you say this is the only one you can recall how about the 25 steer?

A. Yes he was in there.

The 17 on the left ribs and the TS on the left thigh I think were there. It seems to me the OO on the left hip cow was cut in the field there. She got into the Peterson field because we throwed her into this field, sometime before. This roundup had passed the Peterson ranch sometime before and that time we throwed some cattle into the Peterson field.

Qi How did you come to take up this OO animal of Henry No Bear?

A. It was on the roundup, and any time I saw anything like that I thought was safe to pick up, I took it.

Q Who helped you throw these cattle in the

Peterson field?

A. I think Mitchell helped me part of the way and they had some young fellow there working at the time and he helped take them down the rest of the way.

I think that in this bunch of Peterson cattle, which we got out from the Burd field, there was a steer branded 25, a cow branded 17, and a cow branded TS and the T anchor P steer, and the R steer.

Recross Examination.

(By MR. CARLETON.)

Q. These animals you had picked up the same as the others?

A. Yes out of that Burd field, taken for the roundup.

I am not positive that I saw them OO animal driven into the Peterson field, This animal might have been in the Burd field, I can't recollect. I remember that I testified at the first trial that the OO cow was thrown into the Burd field with the rest, and that testimony is correct. I had no conversation with Mitchell about the 25 and the 17, when we took them out of the Burd field.

BY THE COURT: You say you threw some of these into the Peterson field? Where did you put the cattle first?

In the Burd field. We took them back to the Peterson field. No that was another bunch already in there taken out of the Burd field after the roundup went by. We took these 6 or 7 head from

the Burd field up to the Peterson field at the finish of the roundup. The cattle were first put in the Burd field and they were brought to the Peterson field after the roundup. As we passed the Peterson ranch with the roundup a couple of weeks before we quit, some cattle were thrown into the Peterson field as we passed, but none of the 6 or 7 head that I have just been speaking about. I don't know if the Bar Double O was left in the Peterson field or the Burd field. There were some cattle had been put in the Peterson field. Mitchell and some other fellow helped me part way. Mitchell helped me put them in, because we were moving the old bunch and they were put in together. This was a bunch cut out from the roundup and were put in in order to keep from taking the herd with the wagon. Michell told me the Connolly steers were two I had sold him on the 4th of July, and he said they turned out to be Connolly's and Cobelle's steers. He didn't ask me how I got them. I said: "If they are two of them steers, let me have them back and I will let the owners have them, and I will pay you \$60.00 back for the two steers." It was taken from the \$90.00 that they owed me. I made the settlement with Mitchell, but Mr. Peterson paid me, and no more was said about it so I suppose he told his father. He gave me \$215.00. He owed me \$150.00 and he took \$60.00 off from the \$150.00 so it left me \$90.00; and then I drewed five dollars and \$10.00 and \$20.00 at a time of this \$90.00 until I guess I spent it all by the time the

roundup was finished. I don't think Charles Peterson said anything to me about this allowance of \$60.00.

Redirect Examination.

(By MR. FREEMAN.)

Q. Who kept the account between you and Peterson?

A. I had a little memorandum book and when he would pay me I would put it down the different amounts.

I put down the times I received any money from him.

CHARLES BUCK, sworn as a witness on behalf of the plaintiff, testified in substance as follows:

Direct Examination.

(By MR. FREEMAN.)

My name is Charles Buck and I live on the Black-feet reservation and am engaged in cattle business there. In the fall of 1910 I was running the wagon on the roundup. I am acquainted with Bryan Connelly, and Mitchell Peterson. I was present on the roundup at the time when the difficulty came up with reference to a steer that Bryan Connelly claimed to own that had a Y—K on it. At that time the steer was in the herd back of Levi Burd's and this steer matter came up and Bryan claimed the steer and Mitchell said it was his. They roped the steer and examined the brand and found Connelly's brand on the steer and the steer was turned loose and Bryan took it. Bryan was very much worked up about the steer having Peterson's brand

on it. He wanted to know how it came about and Peterson told him he got the steer from John Bostwick and they kept on talking, and I overheard Mitchell say to him; "Why Bryan you know I wouldn't steal a steer from you." There was a Joe Cobell steer in that herd also with a Peterson brand on. Bryan Connelly was looking for the Joe Cobell steer. Nothing was said in my presence by Connolly to Peterson about Cobell steer. I have heard the steer mentioned but didn't pay any attention to it. Mitchell Peterson was there, working with the wagon, and Bostwick was also working with the wagon, working for Peterson. This took place about three weeks before the roundup closed. I was away when they were finishing up the roundup.

Cross Examination.

(By MR. CARLETON.

Mitchell told me that at the time Connelly came up there he had bought the animal of John Bostwick.

Q. And Mr. Connelly didn't deny that did he?

A. I don't know, I guess he can't deny it if he said it to him.

I heard Mitchell say he would not steal any animals from Bryan. The original brand on that Joe Cobell steer was an NC. I didn't pay much attention to it. I didn't see any Bryan Connelly cow there at that time.

Redirect Examination.

(By MR. FREEMAN.)

I never paid any attention to the steer. I know it was a Joe Cobell. The NC is Cobell's brand. I didn't see this particular brand, I never paid any particular attention to this steer.

Q. Did you see the steer?

A. No sir.

BY MR. FREEMAN: You admit that all these people are wards of the government:

BY MR. CARLETON: Oh yes.

BY MR. FREEMAN: On the Blackfeet Indian reservation in the state and district of Montana?

BY MR. CARLETON: Yes.

BY MR. FREEMAN: Then the names of the persons who appear in the indictment, various names, are the owners of the cattle described therein?

BY MR. CARLETON: Well, I made my admission at the opening of the trial, the court remembers, all with certain exceptions, Mr. Freeman.

BY THE COURT: I doubt that your admission at the time it was made covered ownership.

BY MR. CARLETON: We will now admit, and thought I had, the ownership, except as to those mentioned in count 4. As to those we shall require proof.

BY MR. FREEMAN: With exception to the steer, the Bryan Connelly steer?

BY THE COURT: You admit it, all except the steers, having the steer branded PY?

BY MR. FREEMAN: That you may understand it, as well as ourselves, at the time of the drawing of the indictment we alleged one a steer and one a cow and a cow and steer, because we didn't know from the testimony we had at hand, we couldn't tell what it was, don't you see, so that really, as far as we are concerned in the matter, we simply had in mind that there was one animal belonging to Connelly and one to Cobelle, but whether it was a steer or cow we didn't know, and so we alleged it both ways, both a steer and cow, and the NC of course we alleged that as being the brand.

BY MR. CARLETON: The admission can apply to the first animal described in count 4, but not the last three; as to the ownership of these the defendants insist on proof of the animals described in the indictment.

BY MR. FREEMAN: With the exception of two short witnesses, that ends our case. The train seems to be eight or nine hours late, and the train is not in.

BY THE COURT: Five minutes to five; suspend at this time.

(Whereupon the court adjourned until March 28th, 1913, at 10 o'clock A. M.)

BY MR. FREEMAN: I will now read into the record a portion of the testimony given by the defendant, Charles Peterson, at the former trial. Under stipulation on file the record of the testimony as given at the former trial is deemed to be true and correct. I read from page 384 of the

testimony of Mr. Charles Peterson given on the former trial as follows:

Q. Just a moment before we pass the first bunch. Had you anything to do with the purchase of that bunch?

A. No sir.

Q. Had you any interest in it?

A. Why, not much either, that RK brand belongs to myself and my wife and the Y—K cattle.

Q. I understand Mitchell paid for the four steers with his check?

A. With my check.

Q. Excuse me, I was wrong about that. So they became your property after the purchase and your wife's?

A. Yes sir.

JOE BROWN, recalled as a witness on behalf of the plaintiff testified in substance as follows:

Direct Examination.

(By MR. FREEMAN.)

Q. Mr. Brown I will ask you whether or not in this bunch of cattle testified to as being driven from the Peterson field to the government field and there examined whether or not there was a steer in that bunch belonging to Dick Kipp?

BY MR. CARLETON: Objected to as irrelevant and incompetent and immaterial.

Objection overruled and defendants except to the ruling.

A. Yes sir.

On the steer as I have it the brand is an AK;

there was also the Y—K brand on the left ribs. That was ID stuff also.

Cross Examination.

(By MR. CARLETON.)

I have lived on the reservation twenty one years and have been superintendent of live stock about three years.

Before the inauguration of the permit system the Indians bought and sold stock among themselves without a permit. The permit system was inaugurated under Major Monteith's administration. I judge this was about ten or eleven years ago. The regulation relative to permits is not violated to my knowledge.

BY THE COURT: When an Indian sells this ID stock he must get a permit to sell to another Indian?

A. Yes sir.

Government Rests.

Both Rest.

BY MR. CARLETON: May it please the court, the defendants in this case,—my associate and myself are content to rest their case upon the record as it is made up under the testimony of the Government and we shall take no further time of this court and the jury in the introduction of any testimony. We do desire to place in the record the following: Come now the defendants Charles Peterson, Mitchell Peterson and Walter Peterson, the government having rested its case and announced that it has no further testimony to offer, and move

the court to dismiss the prosecution against them and each of them or to direct the jury to return a verdict of not guilty upon the ground and for the reason that there is no evidence in this case that would support or justify a conviction. The testimony of the government having made out the case of the defendants as made in the opening statement of counsel, we submit the motion to the ruling of the court.

COURT: Well without any comment the court will deny it.

MR. CARLETON: Save an exception.

MR. CARLETON: Come also at this time the defendant Charles Peterson, the government having rested its case and announced that it has no further testimony to offer and moves the court to dismiss the prosecution as to him or to direct the jury to return a verdict of not guilty upon the ground and for the reason that there is no evidence in this case that would support a conviction, on the contrary the testimony of the government itself clearly shows that the defendant, Charles Peterson, was in no way shape or form guilty of the offense in that there is no evidence whatever to show that he had any guilty knowledge at the time of the alleged commission of the offense. We submit that to the ruling of the court.

COURT: Motion denied.

MR. CARLETON: Save an exception.

We also make the same motion as to Walter Peterson for the same reasons.

COURT: The motion is denied.

MR. CARLETON: Come also the defendants and move the court to dismiss the following portions of said count four to-wit: One cow branded NC on the left shoulder the property of Joe Cobell an Indian person.

MR. FREEMAN: I think the testimony of Mr. Buck was it was a steer.

BY THE COURT: Motion denied. The jury will be instructed to disregard the cow. (Exception.)

MR. CARLETON: We make the same motion as to one steer branded NC on the left shoulder the property of Joe Cobell an Indian person. Neither of the NC animals are identified by a single witness. The brand has not been identified and not a scintilla of evidence to support this.

MR. FREEMAN: This is one of the animals which the defendants,—the Bryan Connelly and the Joe Cobell were rounded up as you remember and sixty dollars was allowed back on the hundred and fifty. Mr. Buck testified that Mr. Connelly's or that of Joe Cobell's brand was the NC.

COURT: You admit there was one animal that was stolen?

MR. CARLETON: As to there being a cow there wasn't any cow at all. The District Attorney tried to explain that to the court. As to this animal we expressly stated that we would challenge the prosecution to its proof upon this.

COURT: I will overrule that now and consider it when it comes to the instructions.

(Exception noted.)

MR. CARLETON: There is no evidence to warrant the conclusion that that animal was stolen in the first place even if it had the brands of the defendants or some of them on it. There is no evidence here that this brand was on the property, Bostwick said he bought and paid for.

MR. CARLETON: To the ruling of the court we save an exception. Come also all of the defendants at this time the government having rested its case and announced that they have no further testimony to offer and move the court to dismiss or to instruct the jury to return a verdict of not guilty as to the following portions of said indictment and to withdraw it from the consideration of the jury all that portion found on page 2 at the end of count three reading as follows: "Six other head of cattle, the property of various Indian persons whose true names are to the Grand Jury aforesaid unknown, upon the ground and for the reason that in the first place the allegation itself is too indefinite and vague and uncertain to admit of any proof and on the second ground that there isn't a bit of proof that supports the charge or at least any that would be sufficient to sustain a conviction.

MR. FREEMAN: If the court please there was evidence to support that count. That relates to the driving of the cattle there on the 29th day of July, 1910, when he testified he drove seven or eight head. We were unable to get a description of the Mrs. John Whiteman animal and the Mary

Teasdale.

COURT: For the present the motion is denied.

MR. CARLETON: Exception.

Come also the defendants at this time, the government having rested its case and announced that it has no further testimony to offer and moves the court to dismiss the indictment as to the following animals described in count four thereof, to-wit: One cow branded PY on the left hip, the property of Bryan Connelly, an Indian person for the reason there isn't a scintilla of evidence in this record to support the allegation in the indictment. I submit it to the ruling of the court.

COURT: The jury is instructed to disregard that.

The foregoing comprises in substance all the evidence introduced upon the trial of said case including exhibits.

Whereupon counsel for the respective parties argued said cause to the jury.

Be it further remembered that upon the trial of said cause the government introduced and there were received in evidence the following exhibits:

Gov. Ex. A.

No. 1711; U. S. vs. Peterson, et al
U. S. District Court, Montana
U. S. Exhibit A.

Filed June 20, 1911.

GEO. W. SPROULE, Clerk.

By.....Deputy.

Browning, Montana, November 10, 1910.

We, Mitchell Peterson, Oscar Peterson and Walter Peterson, do solemnly swear that the following named cattle were purchased by us from John Bostwick at different times since July 1, 1910, and that the list named herein are all the cattle purchased by us from the said John Bostwick:

1 steer branded DT on the left shoulder JT.

1 cow branded $\overline{21}$ on the left shoulder.

1 cow branded \mathcal{Z} on the right shoulder.

1 steer branded 2—3 on the right hip.

1 cow branded 17 on the left ribs.

1 cow branded O on the left hip.

1 steer branded Y° on the left hip.

1 cow branded R on right shoulder.

1 cow branded \overline{OO} on the left hip.

1 cow branded $\overline{12}$ on the left shoulder.

1 cow branded 30 on right hip.

1 steer branded \mathcal{F} on right shoulder.

1 cow branded \mathcal{R} on the left hip.

1 steer branded \mathcal{P} on the right hip.

1 steer branded $\mathcal{L}Y$ on the right hip.

1 cow branded \mathcal{S} on the left hip.

1 steer branded 25 on the left ribs.

1 cow branded MW on left hip.

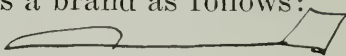
1 steer branded TP on left ribs.

OSCAR PETERSON,
MITCHELL PETERSON,
WALTER PETERSON.

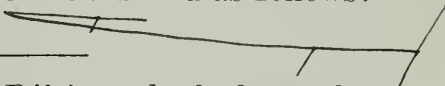
Subscribed and sworn to before me this the
10th day November, 1910.

ARTHUR E. McFATRIDGE,
Supt. & Spl. Disb. Agent.

Government's Exhibit "B" is a brand as follows:



Government's Exhibit "C" is a brand as follows:



Government's Exhibit "D" is a check drawn by
Charles Peterson on The Security State Bank of
Havre, dated July 4th, 1910 and payable to John
Bostwick, and shows payment on July 11, 1910,
by the said The Security State Bank of Havre, and
is in the sum of \$130.00.

Government's Exhibit "E" is a check drawn
by Charles Peterson on the Security State Bank
of Havre, dated August 1, 1910 and payable to
John Bostwick, and shows payment on August
8, 1910, by the said The Security State Bank of
Havre, and is in the sum of \$110.00

Government's Exhibit "F" is a check drawn
by Charles Peterson on the Security State Bank
of Havre, dated August 1, 1910 and payable to

John Bostwick, and shows payment on August 6, 1910, by the said The Security State Bank of Havre, and is in the sum of \$100.00.

Government's Exhibit "G" is a check drawn by Charles Peterson on the Security State Bank of Havre,, dated August 30, 1910, and payable to John Bostwick, and shows payment on September 6, 1910, by the said The Security State Bank of Havre, and is in the sum of \$175.00.

Government's Exhibit "H" is a check drawn by Charles Peterson on The Security State Bank of Havre, dated August 30, 1910, and payable to John Bostwick, and shows payment on September 6, 1910, by the said The Security State Bank of Havre, and is in the sum of \$175.00.

And the defendants introduced as a part of the cross examination of Government's witnesses Exhibits A, E, F, G and I and J.

Defendants' exhibit "A" is a brand, as follows:

EB

Defendants' Exhibit "E":

Willits & Scriver,
U. S. Indian Traders,
General Merchandise.

Browning, Montana, Nov. 13, 1909.

To all whom it may concern.

This is to certify That I sold to M. F. Peterson
3 heads of cattles Bearing my Brand S U N Rt Rib,
2 R. Rt shoulder.

For further information apply to

EDDIE BEAR CHIEF.

(Endorsed:) Bill of sale. Eddie Bear Chief.

Defendants' Exhibit "F":

Nov. 1909.

To all whom it may concern.

This is to certify M. F. Peterson 3 heads of cat-
tles bearing my brands S U N rt Rib 2 R. rt shoul-
der.

For further information apply to

EDDIE BEAR CHIEF.

Defendants' Exhibit "G":

Eddie Bear Chief.

Eddie Bear Chief.

Defendants' Exhibit "I" is a check drawn by
Mitchell Peterson on The Security State Bank of
Havre, dated.....1910, and payable to
John Bostwick, and shows payment on Nov. 1,
1910, by the said The Security State Bank of Havre,
and is in the sum of \$65.00.

Defendants' Exhibit "J" is a check drawn by
Charles Peterson on The Security State Bank of
Havre, dated Oct. 5, 1910, and payable to John
Bostwick, and shows payment Oct. 10, 1910, by the

said The Security State Bank of Havre, and is in the sum of \$25.00.

Thereupon defendants requested the following instructions:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Plaintiff.

vs.

MITCHELL PETERSON, WALTER
PETERSON and CHARLES PETERSON,

Defendants.

No. 1712.

Defendants' Request for Instructions.

Defendants request the following instructions to be given to the jury in this case.

W. F. O'LEARY and

E. A. CARLETON,

Attorney for Defendants.

I.

The Court instructs the jury that before you can convict any one of the defendants you must first be satisfied beyond a reasonable doubt of the truth of three propositions, viz:

First. That the property described in the indictment or some of it, was stolen in the manner and form as charged in the indictment.

Second. That one or more of the defendants received or retained it in his or their possession, with intent to convert it to his or their own use or gain.

Third. That one or more of the defendants re-

ceived or retained the property described in the indictment, or some of it, with knowledge that the same had been stolen.

Each of these three propositions must be proven to your satisfaction beyond a reasonable doubt, and if you have any reasonable doubt as to the truth of any one of them you must give the defendants the benefit of such doubt, and acquit.

II.

You are instructed that as to the question of whether or not the defendants, or any one of them, had knowledge, that at the time they received said property described in the indictment or any of it, and when the same had been stolen, must be actual knowledge, and not mere suspicion or guess that the same had been stolen. And unless you so find from the evidence and all the facts and circumstances in this case and your minds shall be satisfied beyond a reasonable doubt that the defendants did have such actual knowledge at the very time that they did receive any stolen cattle, if such is the fact that they did receive stolen cattle, then it is your sworn duty to acquit.

III.

You are instructed that the statute, under which these defendants are prosecuted, makes knowledge upon the part of the defendants of the fact that they were stolen property, an indispensable condition of conviction.

And even though you should find that all or any part of the property in question was stolen and that

all or any part of it was received by the defendants or any one of them, still neither of those facts is sufficient for a conviction in this case. In the affairs of ordinary business it sometimes happens, as we all know, that people honestly buy and receive stolen property in ignorance of the fact that it has been stolen. But that is no crime, and it is not the offense for which these defendants are on trial.

In considering the question of whether or not these defendants, or any one of them, did have actual knowledge of the fact that any of the cattle in question were stolen, if you find any of them were stolen, and at the time the same or any portion of them were received, it is proper for you to take into consideration the circumstances when they were received and the manner of dealing between the defendants and the seller, as to whether or not they were received openly in the day time or secretly in the night time, and as to whether or not said cattle were secreted or hidden and whether or not the transaction was what we call a secret one, and whether or not the cattle were secreted, and on the other hand whether or not the cattle were branded in broad daylight and were turned upon the open range and where people could readily see them in passing, and you should likewise take into consideration whether or not a fair price for the same was paid or whether it was a price below the reasonable value of said property. And you may also consider as to whether or not the defendants denied

receiving or having said goods and how they dealt and used them, if they did receive them.

You also have a right and it is your duty to consider whether or not it has been shown that these defendants were in the habit of buying stolen property knowing the same to have been stolen, and take into consideration their business and circumstances in life, as likewise whether or not the defendants or any one of them were engaged in the buying and selling of cattle in an honest and legitimate way.

You should likewise take into consideration whether or not the defendants actually knew, at the time they had the dealings in question with the witness Bostwick, that he had been previously engaged in stealing and selling cattle as likewise whether or not said Bostwick was a person, to the knowledge of these defendants, who would be apt to sell stolen property, together with all the other facts and circumstances and the evidence in the case, and if after considering the entire evidence you have a reasonable doubt, you must acquit.

IV.

You are instructed that under the admission of the defendants that the gist of this offense is whether or not the defendants or any of them at the time of the reception and purchase of the cattle actually knew that the same had been stolen or any of them. In order for a conviction of anyone of the defendants it is necessary for the prosecution to satisfy your minds beyond a reasonable doubt that

the defendants knew that the cattle had been stolen at the very time they purchased them. It is not sufficient for a conviction that the proof show that the property in question had been stolen and that it was received and branded by the defendants.

V.

The court instructs the jury, that the defendants are to be tried only on the evidence which is before you, and not on any suspicion, if any, that may have been aroused by questions or arguments of counsel. Suspicion, however strong, is not sufficient to convict anyone of an offense.

VI.

You are instructed in considering the evidence, that if you can reasonably account for any fact in this case upon a theory or hypothesis which will admit of the defendants' innocence, it is your duty, under the law, to do so, and if you have any reasonable doubt of the guilt of any one or all of the defendants, you should give such defendant or defendants the benefit of such doubt and acquit.

VII.

The Jury are instructed that the uncorroborated testimony of an accomplice is not sufficient to convict in this case. By an accomplice is meant one who aids, abets or assists in the commission of some crime. And if you find from the testimony and all the circumstances in the case that the witness, John Bostwick, was an accomplice under the definition above given, and that his testimony is not corroborated, then you should acquit, unless that

you are satisfied beyond a reasonable doubt of the guilt of one or more of the defendants by other testimony.

VIII.

The Court instructs the jury that the defendants are on trial only upon the charge alleged in the indictment, viz., that of buying and receiving stolen property knowing it to have been stolen. And whatever evidence has been admitted which may tend in any degree to show the larceny of other property is admitted solely for the purpose of showing whether or not the defendants had knowledge that the property in question was stolen at the time they received and purchased it.

IX.

If you believe from the testimony and all the facts and circumstances in the case that the defendants or some of them purchased the property in question in good faith without knowledge of the fact that the same or some of it had been stolen, or if you have any reasonable doubt of it, or if you find that the prosecution has failed to prove beyond a reasonable doubt that the defendants or some of them did buy and receive the property mentioned in the indictment or some of it knowing it to have been stolen, or if you have any reasonable doubt of it, then you must acquit the defendants.

X.

The Jury are instructed that in cases of circumstantial evidence, such as we have in this case with reference to the defendants Charles Peterson and

Walter Peterson and Mitchell Peterson you must not only be satisfied beyond a reasonable doubt that all the circumstances are consistent with said defendants having committed the crime alleged in the indictment but you must also be satisfied that the facts are such as to be inconsistent with any other rational conclusion than that said defendants are guilty. If there is a single fact proved to the satisfaction of the jury by a preponderance of the evidence which is inconsistent with said defendants guilt, that is sufficient to raise a reasonable doubt and you should acquit said defendants.

The Court modified the Third Paragraph of requested instruction No. 1, by inserting after the word "knowledge" in line three of said paragraph the following: "belief or reasonable suspicion which he failed to investigate for fear he would learn the truth."

The Court modified requested instruction No. 4 by inserting after the word "knew" in the fourth line of said requested instruction, the following: "believed or reasonably suspected as aforesaid," and by also inserting after the same word "knew" in line seven of said instruction the following: "believed or reasonably suspicioned as aforesaid."

Likewise, also, the Court modified requested instruction No. 9 by adding thereto after the word "knowledge" in line three of said instruction, the following: "or belief or reasonable suspicion which they failed to investigate for fear of discovering

the truth'', and also by adding after the word "knowing" in next to the last line of said requested instruction No. 9 the following: "or believed or reasonably suspicioned as aforesaid."

Thereupon the Court gave its instructions to said jury, and which said instructions are in the words and figures as follows, to-wit:

Instructions of the Court to the Jury.

Gentlemen of the Jury:

It now becomes the duty of the Court to instruct you with reference to the law of the case. In all cases the jury are the exclusive judges of the facts. It is for you to say how much credibility you will give to any witness and what part of his testimony, if any of it, you will believe, and what weight you will give to any part of the evidence or any witness' testimony; and it is your duty also to take the law from the Court.

The law in this case is a statute of the United States, which says that whoever shall buy, receive or conceal any money, goods or other thing which may be the subject of larcency, which has been feloniously taken, stolen or embezzled from any other person, receive it knowing the same to have been so taken, stolen or embezzled, shall be fined not more than a thousand dollars and imprisoned not more than three years. This is a felony.

The property involved in this case is of things of value. The indictment is in four counts. The first count is for receiving, knowing the same to

have been stolen, four head of cattle. The defendants Charles Peterson and Mitchell Peterson admit that these four head in the first count were stolen and that they received and branded them; they deny, of course, that they had any knowledge that they were stolen, and that is a matter for you to pass upon with reference to that count.

The second count charges these defendants with having bought and received six head of stock, stock which the indictment alleges to have been stolen, and that charge is that the defendants received that with the knowledge that it had been stolen. The defendants Charles Peterson and Mitchell Peterson admit that this stock was also stolen and that they received and branded it, but they deny that they had knowledge that it was stolen, and that is for you to determine in respect to that count.

The third count charges the defendants with having bought and received, feloniously, two head of stock, also six other head of cattle, with knowledge that it was stolen. The defendants Charles Peterson and Mitchell Peterson admit—the admission did go to all of it, the six and two—but with reference to the six which are undescribed in the indictment the Court will say to you that you may disregard it, as there is no identification sufficient to find a verdict under that part of the charge. The third count however, describes two head of stock, and Mitchell and Charles Peterson admit that those two head were stolen and that they received and branded them, but they deny that they

had any knowledge that they were stolen, which is for you to determine the truth of.

The fourth count charges the defendants with having bought and received feloniously four head of described stock and two head undescribed. Of these four head the defendants Charles Peterson and Mitchell Peterson admit that they received the first one described, a steer branded PY on the left hip, the property of Bryan Connolly, an Indian person; they admit that they received that, that it was a stolen steer, and they branded it, but they deny that they had any knowledge that it was stolen. They deny everything in respect to the balance of the animals in the fourth count.

In respect to Walter Peterson, the plea is simply not guilty, he admits nothing in respect to any of the stock. Or was the admission that it was received?

BY MR. CARLETON: Not by him, your honor.

BY THE COURT: I understand the admission is, with respect to all parties it was stolen stock and received by Charles and Mitchell and branded.

BY MR. CARLETON: If that wasn't so it may be made so. But so far as Walter is concerned there is no admission by him that he received any of it or that he branded any of it.

BY THE COURT: In respect to this indictment, first, the Court will withdraw all the animals described in the fourth count, except the first one that Charles and Mitchell admitted was stolen and

received and branded by them, for the reason they are in a measure duplicates; for instance, the first animal they admit having received and branded was also charged to be a cow, the District Attorney apparently not being sure of the sex of the animal; and with reference to the Cobelle steer there is no sufficient proof that this particular animal charged in the indictment—there was testimony of a Cobelle steer, but not that it was a steer branded NC as charged in the indictment; so the court will say to you that the only animal upon which you are to pass upon the guilt or innocence of the defendants in the fourth count is the first one described therein. There is some other evidence, upon review of it at the noon hour, the Court has concluded to withdraw from you, and that is all evidence that the cow branded JT of Joe Tatsy, the steer P Diamond of Old Rock, the cow HM of Henry Marceau, the steer ER of Eagle, the cow MF of Frank Monroe, the steer E2 of Young Running Crane, the cow DC of Double Cloth; the testimony in reference to these is all withdrawn from your consideration, and you will disregard it, and for this reason; it was proper enough as it was introduced, because the expectation was that the evidence would go further and show that it came into the hands of these defendants from someone who had stolen it. The evidence was conclusive enough that the property was stolen, but there was no evidence how it got into these defendants hands. Now if these defendants were on trial for stealing stock, the evidence

that they had in their possession other stolen stock might be permitted to raise an inference that they had stolen it; but they are not here charged with stealing stock, but with receiving stolen property, and before the evidence of other stolen stock in their possession can be received and considered by you, from which to draw inference of their knowledge, there must be some proof that it was stolen by someone else other than the defendants; but there is no evidence of that kind here. But, of the steer T Anchor P of Dave Pambrum and of the cow branded TS of Brocky and of the steer branded CZ of Flat Tail, the evidence shows that they received those animals, that is, that there is sufficient evidence, if you believe it, to show that the defendants or some of them received those animals from Bostwick, and that he had stolen them. All other animals than those three named and not described in the indictment—these are animals I have just been speaking to you about that are not described in the indictment at all, and the evidence was allowed to go in only upon the theory that they received them knowing them to be stolen property, it might be a circumstance from which, in connection with other evidence, you could draw an inference that that they received the property described in the indictment knowing it to be stolen, of the property described in the indictment. Now, there is an admission by Charles and Mitchell that it was stolen and branded by them, and I think the proof is sufficient in every respect that the property described

in the indictment as to all these defendants was stolen property and passed over to some of the defendants—Charles and Mitchell at least, by their admission and it is for you to say whether Walter had any hand in that.

In this case you can find the defendants or any one of them guilty under any one of these four counts or all of them, or you can acquit any one or more of them of any one or more of these counts or charges, or you can acquit them of all of them, as the evidence justifies you in doing in your judgment.

In this case the defendants and each of them stand before you presumed to be innocent, and that presumption remains with them and you give them the benefit of that until upon all the evidence you are satisfied, if you ever are, that they are guilty as charged in this indictment beyond a reasonable doubt.

A reasonable doubt does not mean all doubt or any doubt or a suspicion that they might be innocent or a possibility that they might be innocent, but means just what it says, that you, as reasonable men, after a review of all the evidence, taken in connection with the law, feel that you have not an abiding conviction to a moral certainty of the guilt of the defendants. As reasonable men you say to yourself that there is something in this evidence or something lacking in the evidence because of which I am reasonably doubtful whether they are guilty or any of them. If you are in that state

of mind, of course it is your duty to acquit. You are not called upon to determine whether the defendants or any of them are innocent, but if they, or any of them, are not proven guilty to your satisfaction beyond a reasonable doubt, it is your duty, and you are bound under your oath, to acquit them, or any of them.

As indicated to you, the defendants are not called upon to prove their innocence. Now that brings, makes it timely, to refer to the fact that the defendants, and neither of them, took the witness stand. It is commented upon by their own counsel, and hence that opened the door for the prosecution likewise to comment upon it, but the law is that a defendant may take the witness stand at his own request to testify in his own behalf, if he desires, but if he does not request the privilege of taking the witness stand you are not to draw any presumption of guilt from that. It is his right to stand silent and compel the government to prove him guilty beyond a reasonable doubt, if it can. In other words, no matter how guilty he is, he is not bound to go on the witness stand and show you he is innocent; he can stand still and simply see whether or not the government can and will prove him guilty beyond a reasonable doubt. If it does not you are bound to acquit him. You must understand the court is not asking you to infer he believes, or intends to say, these defendants are guilty; that is for you exclusively to determine. If anything the Court says might lead you to believe the

Court has an opinion with reference to the guilt or innocence of the defendants, or if the Court should express some opinion, you are not bound by that. You give it such consideration as you may think it deserves in your judgment, but remember it is not binding upon you. You have the same responsibility to decide the facts as the Court has to give you the law. In other words, the Court's duty is to give you the law correctly, and it is your duty to decide the facts correctly. The Court cannot shift its duty to you, nor can you shift your duty upon the Court because you may think the Court thinks one way or the other upon the proposition involved here.

As before stated, you are the exclusive judges of the credibility of all witnesses, of how much weight shall be given to their testimony or any piece of evidence placed herein. If you believe any witness has testified falsely in any part of his testimony, you have the right to disregard all the testimony of that witness, if you believe none of it is entitled to any consideration.

You will observe that the law involved requires that before a party can be convicted of buying or receiving stolen property he must have knowledge that the property that he is buying or receiving was stolen. Now, the fact that he has this knowledge need not be shown by direct testimony, nor is it essential that the accused have actual or positive knowledge such as one acquires by personal observation of the fact; that is to say, it is not necessary

that he who buys should see the thief taking the property, nor is it necessary that the thief should tell him he stole the property, but if the circumstances and conditions surrounding the purchase, and the nature of the property and all are such that it can be inferred by you, as reasonable men, that the defendant had knowledge, you have a right to draw that inference. You may infer such knowledge from circumstances that should suffice to satisfy a man of ordinary intelligence and caution that the property was stolen.

If the jury believe that the defendants or any of them acted rationally, or the jury are justified in believing that the defendant or defendants acted rationally, and that whatever would carry knowledge or induce a belief in the mind of a defendant that the property was stolen, that would induce it in the mind of a reasonable person under the same circumstances, it would, in the absence of counter-vailing evidence, be considered by you sufficient to apprise the defendant, or induce in his mind a like belief. In other words, you have a right to believe that the defendants acted as any reasonable man, a man of ordinary intelligence, would have acted under like circumstances; you have a right to believe that they could and did draw the same inferences from the circumstances and the situation that any man of ordinary intelligence would draw, and of course it is for you to consider all the circumstances and facts surrounding the transaction to determine whether they did know.

If the facts and circumstances surrounding the defendants' receipt of the property were such as would reasonably satisfy a man of their age and intelligence that the goods were stolen, or if they failed to follow up an enquiry or suspicion so suggested for fear he or they would learn the truth and find the good were stolen, then he or they are held as strictly responsible for receiving stolen goods as though he or they had actual knowledge. In other words, if property is offered to a person under circumstances that cause him to suspect it is stolen, and he makes no enquiry or no investigation because he fears he would find out the truth,—he wants the property and he thinks that because he simply has a well grounded suspicion that that protects him, and he will not make any further enquiry,—in the eyes of the law he is as though he had made the enquiry and had discovered all the facts; because a man cannot shut his eyes to what is apparent to him or what he determines and knows he can ascertain by enquiry; he is charged with what he knows or what he is put upon enquiry to know.

If the circumstances led the defendants or defendant, either one of them, to believe that Bostwick had stolen these cattle or any of them, and if they failed to make enquiry or ascertain whose it was, or the circumstances under which Bostwick became possessed of it, because they feared they would find out he had stolen it, they would be chargeable just the same as though they had the actual and positive knowledge.

A person may be built of receiving stolen property, though it is only constructive possession; if it is under their control, and even though it may be secured from another person, and though the defendant might never have seen it; a person who permits his partner knowingly to receive stolen property for the benefit of both, or if he allows one of those charged together to place it in a common field belonging to them all, in the eyes of the law it is in possession of them all. And a person can receive stolen property by a partner, agent or servant just as well as by his own hand. If one person receives stolen property knowing—I do not remember however, that there is any evidence that these defendants were in partnership; there is evidence from which you can infer that they lived together, worked together, related—father and son—but perhaps none which you can draw the inference that they were partners. The Court was about to observe if one person receives stolen property knowingly, and the other partner knows it and receives it, he would be equally guilty with the first; however, it is not shown there is any element of partnership involved here.

From the circumstances and the testimony, the evidence as it is before you, you must be satisfied, and they must show, beyond a reasonable doubt, that the defendant, or defendants if you find more than one of them guilty, knew the property was stolen, knew, as I have heretofore indicated to you, not necessarily the actual knowledge, but such know-

ledge as would put a reasonable man upon enquiry from which he could ascertain the truth.

So far as Charles and Mitchell Peterson are concerned, and all of the defendants as a matter of fact, you must first be satisfied the property described in the indictment, or some of it was stolen in the manner and form as charged in the indictment. Of course it is admitted, so far as Charles and Mitchell are concerned. Second, that one or more of the defendants received and retained it in his possession with the intent to convert it to his or their own use and gain. I say convert it to their own use is material, but you ascertain that from the circumstances of the case. If you find that they received stolen property knowing that it was stolen, knowing as I have heretofore defined and kept possession of it as their own and for their own uses, branded it, you would have the right to draw the inference therefrom that they had an intent to convert it to their own use and gain. Third, that one or more received and retained the property described, of the property in the indictment, with knowledge, belief or reasonable suspicion that he failed to investigate for fear he would learn the truth that the same had been stolen.

Each of these propositions must be proven to your satisfaction beyond a reasonable doubt, and if you have a reasonable doubt as to any one of them you must give the defendants the benefit of any one of them and acquit.

You are instructed that, under the admission of

the defendants, that the gist of this case is whether or not the defendants, or any of them, at the time of the reception and purchase of the cattle, actually knew, believed or reasonably suspected, as aforesaid, that the same had been stolen or any of them; in order for the conviction of any one of the defendants it is necessary for the prosecution to satisfy your minds beyond a reasonable doubt that the defendants knew, believed, or reasonably suspected, as aforesaid, that the cattle had been stolen at the very time they purchased them. It is not sufficient for conviction that the proof show that the property in question had been stolen and that it was received and branded by the defendants; it must go further and show that the defendants had knowledge as heretofore defined to you, that the property had been stolen at the time it was purchased.

The Court instructs you that the defendants are to be tried only on the evidence before you, and not on any suspicion if any, that may have been aroused by questions or arguments of counsel. Suspicion, however strong, is not sufficient to convict anyone of an offense.

The Court instructs you that the defendants are on trial only upon the charges alleged in the indictment, namely, that of buying and receiving stolen property knowing it to have been stolen; and whatever evidence has been admitted which may tend in any degree to show the larceny of other property is admitted solely for the purpose of showing

whether or not the defendants had knowledge that the property in question was stolen at the time of receiving and purchasing it.

If you believe from the testimony and all the facts and circumstances in the case that the defendants, or some of them, purchased the property in good faith, without knowledge or belief or reasonable suspicion which they failed to investigate for fear of discovering the truth of the fact that the same or some of it had been stolen, or if you have any reasonable doubt of it, or if you find that the prosecution has failed to prove, beyond a reasonable doubt that the defendants, or some of them, did buy and receive the property mentioned in the indictment, or some of it, knowing or believing or reasonably suspecting as before stated, it to have been stolen, or if you have any reasonable doubt of it, then you must acquit the defendants:

In sitting in a jury box gentlemen are not changed at all in their methods or habits of thought. Whatever would convince you as a man of the guilt of a defendant, seriously contemplating the evidence, would be sufficient to convince you as a jurymen. This is a transaction that is entitled to your serious consideration, the interests both of the prosecution and the defendants demand it. You have listened to the evidence and the circumstances surrounding this transaction. Here are these defendants apparently, upon the evidence, living on the Indian Reservation some 16 or 18 miles north of Browning, which is on the railroad, and appar-

ently living and working together. They have a number of different brands. This man Bostwick had lived for a good many years some five or six miles from them on his brother's ranch, an Indian also, with but one leg. They knew him well, he knew them well; he says that Charles Peterson had been on occasions kind to him. Now, there is some evidence that Bostwick had bought and sold cattle and had some money in a bank prior to the particular transactions here involved, but there is no evidence that the defendants had any knowledge of that, or that any of these prior sales had been made to these defendants. It seems, as far as the evidence shows, without any prearrangement of any kind whatever, that Bostwick happens along about the 4th of July in Browning with some four head of stock which he had gotten on the south side of the Reservation, as it is termed, which must be some distance south of Browning. He falls in with Mitchell Peterson there and transfers him these four head of stock and receives a check for it signed by Charles Peterson. Now, of course, the evidence is—and it is proper for you to consider—that this was in the day-time, that apparently what is termed a fair price was paid by the defendants, or which ever of them purchased them, for the property. These cattle were driven home to the ranch of the Petersons, these defendants, and my recollection of the evidence is that both Walter and Mitchell had something to do with the branding, corralling and branding, of them; if, however, Walter had not, you will

remember the testimony. At any rate, from the evidence, these cattle were a long ways from their accustomed range and were of different brands, and those are things and circumstances for you to consider. It seems that no permits were asked for; Bostwick was not asked whether he had a permit to sell; he was not asked where he purchased them, and whether he had received a bill of sale from whoever he purchased them from. There is no evidence that Bostwick was known to own any herd of cattle which would supply them, or that he had any brand, and it is for you to consider whether or not it could be reasonably supposed that the defendants assumed these four cattle were raised by Bostwick, or whether they assumed that he had purchased them or traded for them, or whether they were just to draw that presumption from the circumstances as they then presented themselves. There is no evidence that these cattle were concealed anywhere in the mountains or hidden, but I don't know whether there is any evidence they were turned loose on the open range. The defendants had fields fenced in there.

there.

MR. CARLETON: Pardon me, I think that was only—

COURT: Well, the jury will remember if they were. Some of other of these four lots may have been, but with reference to these four the evidence, I don't remember any evidence, I don't remember any evidence that any of them were turned on the

open range, unless you infer it from the fact that on the roundup the Cobelle and Connolly steer were picked up and found by Connolly, who owned one and had dominion over the other. And those are circumstances for you to consider, whether a man in buying or receiving stolen property would allow it to run in whatever way this stock was accustomed to run.

It seems the corral where they were branded is some ways from the road. I assume the Reservation is not a thickly settled place; whether or not people are continually going around looking for stock or whether they turn their stock on the range and don't see it from one year's end to the other does not appear from the evidence. At any rate, that is the transaction.

A little later, in the same month, I think, possibly the first of August, I am not sure, Bostwick, so far as the evidence shows with no arrangement whatever with any of the defendants appears this time. I think at their ranch on the South Fork, with some six or seven head, and he sold those, the bargain being made through Mitchell apparently, and received Charles Peterson's check for them, for what is said again to be a fair price,—all that is for you to determine. However, there is no evidence contradictory of the testimony of Bostwick that it was a fair price, and the Court thinks that you must find from that evidence that under all the circumstances the price was fair. They were not beef cattle apparently. These cattle again were of mix-

ed brands, and again, so far as the evidence shows, there was no enquiry from him as to where he had received them, except possibly that he told them he had gotten them on the south side, and nothing asked of him if he had bills of sales or permits. Now it is true that personal property can be transferred without the necessity of a bill of sale passing, but it is for you to consider whether a man buying from another man happening at his place with a bunch of cattle with strange brands would buy without ascertaining where they were from and whether he had any right to sell them, and would ask whether had a bill of sale.

The permit question is a circumstances to be considered by you. It is the law that an Indian cannot sell any of this Interior Department, or I. D. cattle as it is called, without a permit, to a white man. Whether that white man is married to an Indian woman or not, it is a serious offense for a white man to buy such stock without ascertaining if the Indian had a permit to sell. But, while there is no evidence that there were any negotiations between the Indian Bostwick and Charles Peterson directly, you will determine whether it was a method by which Charles was buying without himself being drawn directly into the transaction, to escape the provision of the law that I have referred to.

There is no law that an Indian cannot sell to an Indian without a permit, but it does seem that the Agent has taken it upon himself to make a regulation to that effect, and the Court will not say that

he would have authority, binding authority, to do so; it doubtless would be a wise regulation. However, the evidence is that that regulation was generally lived up to.

The inspector tells you that he knew of no time when it was violated, and so the evidence appears to you. And then it is a circumstance for you to consider, if that was the regulation to govern these Indians and they lived up to it, why it was not lived up to in this particular instance. It is true that apparently the Indian Bostwick sold some cattle to these Indians after the same fashion which he had a right to sell, cattle that he himself had bought. Now, whether that is a sufficient excuse for the absence of a permit in the other cases, it is a matter that you are to consider and draw such conclusions from the whole that to you as reasonable men, seems justified.

A little later Bostwick appears again at the Peterson ranch some time in August, the latter part of August with a bunch of 16 or 17 head; of that bunch it was that he said he owned about a half, that he had bought them somewhere; the other half were stolen. No previous arrangement as far as seeing them. And these cattle were again sold. I think the negotiations through Mitchell though Charles Peterson's check passed again, if I remember rightly, and there was a balance left due of \$150.00 as you will remember. These again were mixed brands, without permits or any enquiry, so far as the testimony shows.

A little later Bostwick goes to work for the Petersons, the defendants, at ten dollars a week, riding on the roundup. The roundup came on. Sometime during that roundup, the evidence is, that Connolly discovered one of his steers branded with the Peterson brand Y—K; and it was one; according to what Mitchell Peterson told at that time, of the first bunch sold in July by Bostwick to some of the Petersons, and the brand on the property was that of Charles and his wife. There was some testimony read to you from the former trial wherein Charles had said, if I remember rightly, that while he had no part in the buying of the cattle, that after they were bought the Y bar K and the RK brand was placed upon them and they were the property of himself and his wife, though I think the brands are his wife's nominally in the office record, his wife's brand if I remember the evidence correctly. This Connolly steer was found by Connolly. It seems these brands are not always distinct, and that too is a circumstance to consider, whether it might serve as a reason why a stolen head of stock, after a brand was placed upon it, might be turned on the range when the former brands are not always distinct. Apparently they could not tell this Connolly brand without throwing the animal down and examining it closely; I will not say it was clipped, I don't think it was; anyhow they found it was Connolly's steer, and some conversation passed between Connolly and Mitchell Peterson and Mitchell stated to Connolly he had bought it from Bostwick.

The same occurred with reference to the Cobelle steer. Some time later apparently Mitchell meets Bostwick and, so far as the evidence shows, he does not reproach him, he does not accuse him of any wrong doing nor make any charge against him; he simply says, "Those were other men's cattle," and an allowance of \$60.00 was made for those two; an allowance was made by Bostwick to Mitchell for those two steers—Cobelle and Connolly steer. And still later, when Bostwick settles up with Charles Peterson, this allowance or deduction was made from what was coming from him. Now, that was about the middle of the roundup; at least, it was some time in the round-up, the evidence is in substance, on that score.

A little later, at the end of the round-up, occurs the incident testified to by Bostwick with reference to the "R" steer which went up the gulch, went after by Mitchell Peterson and Bird and the T anchor P steer, the last day of the roundup. It seems that they had already left some of the stock in Peterson's field; and they turned the bunch into Burd's field. Bostwick tells you of a conversation between him and Mitchell Peterson and some conversation when they were all driving down to Petersons when Walter was there, some enquiry about who owned the steer, and that it fell behind and that he and Mitchell stopped behind and talked about this steer, and they again apparently had struck a dim brand, for they threw that one down to examine the brand and they found it was Pambrun's steer, and, according to

Bostwick now this is, Bostwick said they laughed about it and thought they wouldn't take any chances on that one. But the next day, when it was in the corral at Peterson's or in the field at Petersons, there was again talk about this steer, and that he and Mitchell Peterson agreed that they would take a chance on it, if Bostwick would sell it to him, Mitchell Peterson, for the "Black-jack debt, some \$10.00, and it was so done. Now, there is a circumstance, along with the Connolly and the Cobelle steer for you to consider in determining whether Charles and Mitchell Peterson, and the Petersons all of them, whether they knew that the last bunch was stolen, or whether it was sufficient to put them on enquiry as reasonable men to enquire something about the balance of that bunch. The last bunch were all stolen, some six or seven, and in that was the T anchor P steer at least, which, if you believe Bostwick, Mitchell Peterson absolutely knew that Bostwick was assuming to steal and sell to him. And that was after the Connolly and Cobelle steer settlement had been had, or after it had been discovered that they had been sold by Bostwick when they were not his. And you have a right to consider from those circumstances whether these defendants knew or, as reasonable men, knew enough to know that if they made enquiry they would have found out there were others of the steers sold before, as well as after, by Bostwick to them that were stolen. And if as reasonable men you believe that they did, or such of them as you believe did, it will be your

duty under the evidence to find them guilty of such portion of the charge, at least, as would relate to the last bunch of cattle sold.

There is little reason to doubt that these incidents, as Bostwick related them to you, occurred with reference to the Cobelle and the Connolly steer, for Buck corroborates that to some extent. There is no reason to doubt that the conversation about the T Anchor P steer took place because Bostwick testifies to that, it is one of the steers that was found afterwards with the Peterson brand, if I remember the evidence aright, and that testimony is uncontradicted.

There is one thing that I will say, however, with reference to Bostwick. I think that it would be the view of the law, that Bostwick, if the defendants knew he was selling them stolen stock, that he would be an accomplice of theirs. That would lead you, of course, to give Bostwick's testimony serious consideration; scan it very carefully. You should do that anyhow, because he has been convicted of stealing this stock, and you take that into consideration in weighing his evidence; and you take his evidence, however, in connection with all the evidence and the circumstances to determine whether or not upon the whole you are satisfied beyond a reasonable doubt that the defendants, or either of them; are guilty as charged in respect to any one or more of the counts.

I do not believe that it is necessary for the court to review the situation any further. I think that

you, as reasonable men, having listened to this evidence, understand the situation and understand the circumstances that surrounded all these transactions, and can draw such inferences as are justified, that you feel are justified, as well as though the Court reviewed it further.

As I said before, you alone are the judges of the credibility of the witnesses and the weight to be given to testimony, and of the reasonable inferences and presumptions that can be drawn or should be drawn from testimony by reasonable men. You are not to place any strained construction upon it, but that which seems to you reasonable under all the circumstances.

When you retire to the Jury room you will select one of your number foreman and deliberate upon your verdict. Twelve of your number must agree upon any verdict that you find. You may find, if it would be a verdict of guilty, upon any one count; the Court would accept a disagreement of any other count. This is not to encourage you to disagree; the Court thinks you can agree on all these counts. That is left to you.

Any exceptions to the charge. All those you handed me that I did not give, of course, are refused.

BY MR. CARLETON: On the fullness and fairness of the charge it seems to make any exceptions would be a matter of supererogation, but in view of the condition of the law as to this specific charge of receiving stolen property, I think the defendant

jointly and severally will except to that portion, for the sake of the record, as to all those portions of the charge which imply or suggest that anything less than knowledge would be sufficient to convict.

BY THE COURT: Let the exception be noted.

BY MR. CARLETON: And also to that portion of the charge which permits the jury to take into consideration the T anchor P and any other animals which are not described in the indictment.

BY THE COURT: Let the exception be noted.

BY MR. CARLETON: And we will also, for the sake of the record, note the following:

The refusal of the court to give the requested Instruction No. 7; that is, really the Court gave it in part, relating to the uncorroborated testimony of an accomplice. Shall we state the reasons for the exception?

BY THE COURT: Oh no, you can take your exception to that portion, specifically pointing it out.

BY MR. CARLETON: Also to the modification which the Court gave of Instruction No. 9, and also the refusal of the Court to give the modification in Instruction No. 1 of Instruction No. 4.

BY THE COURT: Very well.

BY MR. CARLETON: Also the refusal of the Court to give Instruction No. 6.

BY THE COURT: Let it be noted.

BY MR. CARLETON: And also the refusal of the Court to give Instruction No. 10.

BY THE COURT: Very well.

Thereafter the Jury returned into Court for ad-

ditional instructions or information. And

BY THE COURT: It seems that sometime early in September Bostwick went to work for the Petersons on the roundup and he worked six weeks, and about the same time along during the roundup, Bostwick says, two weeks before the lest sale was when Mitchell spoke to him about the Cobelle and Connolly steers, that they had been claimed by Connolly, and that it was agreed between them that an allowance of \$60.00 was to be made for these two steers. My recollection is that Buck said that when the conversation took place between Connolly and Mitchell with reference to these steers that it was about three weeks before the end of the roundup. Now after this occurred the roundup continued for either about two weeks, as Bostwick says, or about three weeks, as Buck says. Of course the recollection of weeks that far off is pretty difficult, you can appreciate that. During that time they were on the roundup, the two Peterson boys and Bostwick, and just at the end of the roundup was when they drove the herds up and brought some into Peterson's field and went on by and dropped the balance into Burd's field. And that night was apparently the time of the conversation, coming back from Bird's field, in reference to this T anchor P steer, which was one of the last buch sold; and you heard that conversation; you remember it as Bostwick related it. And the next day apparently there was some branding done at Peterson's field, and that was when the last sale was made of the six head,

and those six head, if I recollect rightly, are the ones that are set out in the first count. Is that right? ("That is right.") That is, four of them are. The T anchor P steer for some reason has not been set out in that count. Of course, the significance of the T anchor P steer and the Cobelle and Connolly steer is that, whether or not it should have put them on notice, Mitchell on notice, and whether or not from his relation with his brother and father they were all put on notice that Bostwick was selling stolen stock, and hence whether they had the knowledge, so far as knowledge is required by law, that they were buying and receiving stolen stock. So far as the evidence shows that is about all that occurred between the incident of the Cobelle and Connolly steers and the last sale. Of course, the Cobelle and Connolly steers, it is for you to determine whether or not it is significant from the standpoint that they must have known all the time or whether they knew all the time that they were buying stolen stock, in this, that it seemed to arouse no particular resentment on Mitchell's part that Bostwick had no right to sell those two; he apparently made no particular complaints so far as the evidence shows, made no effort of bringing Bostwick to Justice, accused him of nothing, simply went on dealing just the same. Is there anything further you would like to ask, any of you gentlemen?

JUROR HUSETH: It is all Bostwick's testimony as to what was going on?

THE COURT: By Buck, Buck tells you, remember, the Indian Buck, that he heard Connolly and Mitchell Peterson have this conversation about the Cobelle and Connolly steers. Of course, it is admitted by the defendants themselves that these steers named in the indictment were stolen steers, and that they received them and branded them, so that you have not by any means simply the Bostwick testimony, and the recollection that nobody has contradicted it.

Any exceptions?

BY MR. CARLETON: No, I think not, your Honor.

Whereupon said Jury again retired in charge of a sworn officer to further deliberate upon their verdict and after remaining out all of said Friday night without any verdict being agreed upon or any report to the court being made, said jury, and on the following day of Saturday, March 29, at about the hour of eleven o'clock A. M. returned into court and reported through their foreman that they had agreed upon a verdict as to the defendant Walter Peterson, but that they were unable to agree upon a verdict as to the two remaining defendants.

BY THE COURT: The court at this time declines to receive a verdict as to one defendant. The case should be finally disposed of as to all. This is, as you know, the second trial. To try it again means to try it before a jury drawn from the same community that you have been, and with no reason to believe that they would be any more intelligent or

honest than you are or any more likely to arrive at a verdict. Justice to both parties demands that the case be brought to an end. The expense of these trials is very great; possibly the expense of the parties so far incurred is from seven to ten thousand dollars. The government has a right to a verdict without farther expenditure of time and money. The defendants if guilty have a right to have that fact determined by a verdict before they are bankrupt in pocket, and likewise if they are innocent they have the right to be acquitted before their means are exhausted. You state, in answer to the Court's question, that you stand seven to five. If seven are for an acquittal the five should seriously enquire whether there is not a reasonable doubt of the guilt of the defendants when seven of their fellows of equal intelligence and honesty have found that there is; if seven are for conviction the five should equally seriously enquire whether there is a reasonable doubt of the guilt of the defendants when seven of their fellows of equal intelligence and honesty find there is no doubt. After three days spent in the trial of this case, with no reason to believe that it can be any better tried before another jury, the Court is disposed to direct you to further consider the case, believing that you can honestly come to an agreement. You may retire.

BY MR. CARLETON: As to that part relating to the expenses to the parties I wish to take exception.

BY THE COURT: The court notes that the

reference to expense or costs was in the mind of the defendant's counsel in his argument to the jury that the defendants in two trials upon this indictment had been put to great expenses and so had been punished enough and should be acquitted.

And thereupon, and for the third time, said jury retired in charge of a sworn officer to further deliberate upon their verdict and within less than one hour thereafter said jury returned into court the following verdict:

(TITLE OF COURT AND CAUSE.)

(VERDICT.)

(Here insert verdict.)

Whereupon the court discharged said jury from further consideration of said cause.

And thereupon, the time for receiving sentence being duly waived, the court pronounced judgment upon said verdict by sentencing the defendant, Mitchell Peterson, to the Federal penitentiary at Leavenworth, in the state of Kansas, for the period of one year and one day, and to pay a fine of Two Hundred Dollars and costs.

And thereafter and on said 29th day of March, 1913, upon application of counsel for the defendants duly made therefor, in open court, the court duly granted the said defendant, Mitchell Peterson, sixty days in addition to the statutory time in which to prepare, serve and file his bill of exceptions herein, on his petition for a new trial.

And now comes the defendant, Mitchell Peterson, by his counsel, and hereby presents the foregoing

as and for his bill of exceptions herein, upon his application for a new trial of this cause and moves the court that the same may be settled, signed and allowed and certified by the Judge as true and correct, as provided by law, and that the same be ordered filed as a record herein.

W. F. O'LEARY, and
E. A. CARLETON,

Attorneys for defendant Mitchell Peterson.

Due service of the foregoing bill of exceptions is hereby admitted and copy thereof received this 2nd day of May, 1913.

J. W. FREEMAN,
United States Attorney.

And now, on this 22 day of July, and within the time allowed by law and the orders of this court, the foregoing bill of exceptions, on petition for a new trial herein, is hereby settled and allowed, signed and certified as true and correct, and contains in substance all the evidence introduced on the trial of said cause, and the same is hereby ordered entered as a record herein.

GEO. M. BOURQUIN,
Judge.

(Endorsed): No. 1712. Title of Court and Cause. Defendant Mitchell Peterson's Bill of Exceptions. Received for the Court, May 2-1913. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy. Filed and Entered Jul. 22, 1913. Geo. W. Sproule, Clerk.

And thereafter, and on July 22, 1913, the defendant duly served and filed his Bill of Exceptions No. 2 herein as follows, to-wit:

*In the District Court of the United States, District
of Montana.*

UNITED STATES OF AMERICA,

PLAINTIFF,

VS.

MITCHELL PETERSON,

CHARLES PETERSON and

WALTER PETERSON,

DEFENDANTS.

No. 1712.

DEFENDANT, MITCHELL PETERSON'S

BILL OF EXCEPTIONS NO. 2.

BE IT REMEMBERED that the above entitled cause came on regularly for trial on the 26th day of March, 1913, before the court, sitting with a jury, duly impaneled to try said cause, the Hon. George M. Bourquin, judge, presiding.

The evidence being closed, and the arguments of counsel concluded, the court thereupon charged the jury. Whereupon the jury, at about the hour of four o'clock P. M. of Friday, March 28, 1913, retired in charge of a sworn officer to deliberate upon their verdict, and subsequently, and along in the evening of said day returned into court and requested the court to give them further instructions upon certain points in the case.

Thereupon, the court, in pursuance of said request of the jury, instructed the jury touching the

points upon which they had requested further instructions.

Whereupon, said jury again retired in charge of a sworn officer to further deliberate upon their verdict, and after remaining out all of said Friday night without any verdict being agreed upon or any report to the court being made, said jury, and on the following day of Saturday, March 29, at about the hour of 11 o'clock A. M. returned into court and reported through their foreman that they had agreed upon a verdict as to the defendant, Walter Peterson, but that they were unable to agree upon a verdict as to the two remaining defendants.

BY THE COURT: The Court at this time declines to receive a verdict as to one defendant. The case should be finally disposed of as to all. This is, as you know, the second trial. To try it again means to try it before a jury drawn from the same community that you have been, and with no reason to believe that they would be any more intelligent or honest than you are or any more likely to arrive at a verdict. Justice to both parties demands that the case be brought to an end. The expense of these trials is very great; possibly the expense of the parties so far incurred is from seven to ten thousand dollars. The government has a right to a verdict without further expenditure of time and money. The defendants, if guilty, have a right to have that fact determined by a verdict before they are bankrupt in pocket, and likewise if they are innocent

they have a right to be acquitted before their means are exhausted. You state to the Court that you stand seven to five. If seven are for an acquittal the five should seriously enquire whether there is not a reasonable doubt of the guilt of the defendants when seven of their fellows of equal intelligence and honesty have found that there is: if seven are for conviction the five should equally seriously enquire whether there is a reasonable doubt of the guilt of the defendants when seven of their fellows of equal intelligence and honesty find there is no doubt. After three days spent in the trial of this case, with no reason to believe that it can be any better tried before another jury, the Court is disposed to direct you to further consider the case, believing that you can honestly come to an agreement. You may retire.

Whereupon counsel for defendants duly excepted to all those portions of said instructions of the Court which relate to the cost or expense of the litigation, and which said exception was duly allowed by the court.

BY THE COURT: The court notes that the reference to expense or costs was in mind of the argument of defendants' counsel to the jury that the defendants in two trials upon this indictment had been put to a great expense and so had been punished enough and should be acquitted.

And thereupon, and for the third time, said jury retired in charge of a sworn officer to further deliberate upon their verdict, and within less than

one hour thereafter said jury returned into court the following verdict:

(TITLE OF COURT AND CAUSE.)

(VERDICT.)

(Here insert Verdict.)

Whereupon the court discharged said jury from further consideration of said cause.

And thereupon, the time for receiving sentence being duly waived, the court pronounced judgment upon said verdict by sentencing the defendant, Mitchell Peterson to the Federal penitentiary at Leavenworth, in the state of Kansas, for the period of one year and one day, and to pay a fine of Two Hundred Dollars, and costs.

Comes now Mitchell Peterson, one of the defendants above, by his counsel W. F. O'Leary and E. A. Carleton, and submits and proposes the foregoing as and for his bill of exceptions No. 2 herein, and respectfully asks the court that the same be signed, approved and allowed, as true and correct and ordered entered as a record herein.

W. F. O'LEARY and

E. A. CARLETON,

Attorneys for Defendant, Mitchell Peterson.

Due service of the foregoing bill of exceptions is hereby admitted this 4th day of April, A. D. 1913.

J. W. FREEMAN,

United States Attorney.

And now on this 22d day of July A. D. 1913, the foregoing bill of exceptions is hereby settled and allowed and signed and certified as true and correct,

and the same is hereby ordered entered as a record herein.

GEO. M. BOURQUIN,
Judge.

(Indorsed): No. 1712. Title of Court and Cause. Defendant Mitchell Peterson's Bill of Exceptions No. 2. Received Apr. 4 1913. Geo. W. Sproule, Clerk. Filed July 22, 1913. Geo. W. Sproule, Clerk.

And thereafter, and on the 11th day of August, 1913, the defendant duly filed his Assignment of Errors herein, and which said Assignment of Errors, is in the words and figures following, to-wit:

(TITLE OF COURT AND CAUSE.)

No. 1712.

ASSIGNMENT OF ERRORS.

Comes now the defendant above, by his counsel, and hereby makes and files the following assignment of errors, upon which he will rely, as follows, to-wit:

1.

The Court erred in refusing to consider defendant's motion to dismiss the case and, upon the hearing of said motion, to dismiss said case.

2.

It was error on the part of the Court to overrule defendant's objection to the introduction of any testimony in this case.

3.

It was error on the part of the court to admit any testimony in this case tending to show criminality respecting any cattle not described in the indictment herein.

4.

It was error on the part of the Court to overrule the objection to the following question:

Q. "And the cow, branded _____, and the steer branded CZ of Flat Tail?

A. "This steer was branded Y-K on the left ribs."

5.

It was error on the part of the Court to overrule the objection to the following question:

Q. "State whether or not you found among the bunch of cattle a steer branded Lazy P diamond, on the left shoulder."

A. "This steer with the Lazy P Diamond on the right shoulder was branded RK on the left shoulder."

6.

It was error on the part of the Court to overrule the objection to the following question:

Q. "I will ask you whether or not in that bunch of cattle you found a cow branded HM on the left hip?

A. "Yes, sir."

7.

It was error on the part of the Court to overrule the objection to the following question:

Q. "State whether or not among that bunch you also found a steer branded E2, the 2 combined with the top of the E, on the left hip?"

A. "The E2 brand belongs to an Indian by the name of Young Running Crane. There was a Y-K brand upon it at that time."

8.

It was error on the part of the Court to overrule the objection to the following question:

Q. "Among these cattle that were driven in from the defendants, state whether or not there was an animal branded MF, belonging to Frank Monroe?"

A. "Yes, sir, there was."

9.

It was error on the part of the Court to overrule the objection to the following question:

Q. "State whether or not there was an animal branded JT?"

A. "Yes sir, there was one cow with a JT on the left shoulder, and Y-K on the left hip."

10.

The Court erred in overruling the objection to the following question:

Q. "Did you find any of your bunch there?"

A. "Yes, sir."

11.

It was error on the part of the Court to sustain the objection to the following question:

Q. "You never accused any of these defendants of stealing it?"

12.

It was error on the part of the Court to sustain the objection to the following question:

Q. "State whether or not there was any difference of opinion between all of you there, including the Petersons, as to the brands that were on these animals and which Joe Brown put down in his book."

13.

It was error on the part of the Court to overrule the objection to the following question:

Q. "What have you got to say as to whether or not you all agreed as to the brands that were upon these cattle as they went through the chute?"

A. "They all agreed on the brands."

14.

It was error on the part of the Court to overrule the objection to the following question:

Q. "Can you give us a description of any other cattle of this 6 or 7 head, branded there on the 21st day of October, besides the 25 and the 17 and the TS and the OO?"

A. "Yes, an R steer, I think, and an MW cow, and the T anchor P steer."

15.

It was error on the part of the Court to overrule the objection to the following question:

Q. "Mr. Brown, I will ask you whether or not in this bunch of cattle, testified to as being driven from the Peterson field to the government field and there examined, there was a steer in that bunch

belonging to Dick Kipp?"

A. "Yes sir."

16.

It was error on the part of the Court to deny the defendants' motion at the close of the government's case, to dismiss the case against this defendant.

ERRORS IN INSTRUCTIONS.

17.

It was error on the part of the Court to refuse to give defendant's requested instruction No. 1, and likewise error to give said instruction as modified by the court, which said requested instruction is as follows:

"The court instructs the jury that before you can convict any of the defendants you must first be satisfied beyond a reasonable doubt of the truth of three propositions, viz:

First. That the property described in the indictment, or some of it, was stolen in the manner and form as charged in the indictment.

Second. That one or more of the defendants received or retained it in his or their possession, with intent to convert it to his or their own use or gain.

Third. That one or more of the defendants received or retained the property described in the indictment, or some of it, with knowledge that the same had been stolen.

Each of these three propositions must be proven to your satisfaction beyond a reasonable doubt, and if you have any reasonable doubt as to the truth of

any of them you must give the defendants the benefit of such doubt, and acquit."

The Court modified the foregoing instruction by inserting therein, after the word "knowledge," in the third subdivision thereof, the following, "belief or reasonable suspicion which he failed to investigate for fear he would learn the truth."

19.

It was error upon the part of the Court to refuse to give defendant's requested instruction No. II, which requested instruction reads as follows:

"You are instructed that as to the question of whether or not the defendants, or any of them, had knowledge, that at the time they received said property described in the indictment or any of it, and when the same had been stolen, must be actual knowledge, and not mere suspicion or guess that the same had been stolen. And unless you so find from the evidence and all the facts and circumstances in this case and your minds shall be satisfied beyond a reasonable doubt that the defendants did have such actual knowledge at the very time they did receive and stolen cattle, if such is the fact that they did receive stolen cattle, then it is your sworn duty to acquit."

20.

It was error on the part of the Court to refuse to give defendants' requested instruction No. III, which requested instruction reads as follows:

"You are instructed that the statute, under which these defendants are prosecuted, makes knowledge

upon the part of the defendants of the fact that they were stolen property, an indispensable condition of conviction.

And even though you should find that all or any part of the property in question was stolen and that all or any part of it was received by the defendants or any one of them, still, neither of those facts is sufficient for a conviction in this case. In affairs of ordinary business it sometimes happens, as we all know, that people honestly buy and receive stolen property in ignorance of the fact that it has been stolen. But that is no crime, and it is not the offense for which these defendants are on trial.

In considering the question of whether or not these defendants or any one of them, did have actual knowledge of the fact that any of the cattle in question were stolen, if you find any of them were stolen, and at the time the same or any portion of them were received, it is proper for you to take into consideration, the circumstances when they were received and the manner of dealing between the defendants and the seller, as to whether or not they were received openly in the day time or secretly in the night time, and as to whether or not said cattle were secreted or hidden and whether or not the transaction was what we call a secret one, and whether or not the cattle were secreted, and on the other hand, whether or not the cattle were branded in broad day light and were turned upon the open range and where people could readily see them in passing, and you should likewise take into consider-

ation whether or not a fair price for the same was paid or whether it was a price below the reasonable value of said property. And you may also consider as to whether or not the defendants denied receiving or having said goods and how they dealt and used them, if they did receive them.

You also have a right and it is your duty to consider whether or not it has been shown that these defendants were in the habit of buying stolen property knowing the same to have been stolen, and take into consideration their business and circumstances in life, as likewise whether or not the defendants or any one of them were engaged in the buying and selling of cattle in an honest and legitimate way.

You should likewise take into consideration whether or not the defendants actually knew, at the time they had the dealings in question, with the witness Bostwick, that he had been previously engaged in stealing and selling cattle as likewise whether or not said Bostwick was a person, to the knowledge of these defendants, who would be apt to sell stolen property, together with all the other facts and circumstances and the evidence in the case, and if after considering the entire evidence you have a reasonable doubt, you must acquit."

21.

It was error upon the part of the court to refuse to give defendants' requested instruction No. IV, and likewise error to modify said requested instruction as the court did, and to give the same as

modified. Said requested instruction reads as follows:

“You are instructed that under the admissions of the defendants that the gist of this offense is whether or not the defendants or any of them at the time of the reception and purchase of the cattle, they actually knew that the same had been stolen or any of them. In order for a conviction of anyone of the defendants it is necessary for the prosecution to satisfy your minds beyond a reasonable doubt that the defendants knew that the cattle had been stolen at the very time they purchased them. It is not sufficient for a conviction that the proof show that the property in question had been stolen and that it was received and branded by the defendants.”

The Court modified said instruction by inserting after the word “knew,” in line four thereof, the following, “believed or reasonably suspected as aforesaid,” and also added to said requested instruction, after the word “knew” in the seventh line thereof, the following, “believed or reasonably suspicioned as aforesaid.”

22.

It was error on the part of the Court to refuse to give defendants’ requested instruction No. VI, which requested instruction reads as follows:

“You are instructed that in considering the evidence, that if you can reasonably account for any fact in this case upon a theory or hypothesis which will admit of the defendants’ innocence, it is your

duty, under the law, to do so, and if you have any reasonable doubt of the guilt of any one or all of the defendants, you should give such defendant or defendants the benefit of such doubt and acquit."

23.

It was error on the part of the Court to refuse to give defendants' requested instruction No. VII, which said instruction reads as follows:

"The jury are instructed that the uncorroborated testimony of an accomplice is not sufficient to convict in this case. By an accomplice is meant one who aids, abets or assists in the commission of some crime. And if you find from the testimony and all the circumstances in the case that the witness, John Bostwick, was an accomplice under the definition above given, and that his testimony is not corroborated, then you should acquit, unless you are satisfied beyond a reasonable doubt of the guilt of one or more of the defendants by other testimony."

24.

It was error on the part of the Court to refuse to give defendants' requested instruction No. IX, and likewise error to give the same as modified by the Court. Said instruction No. IX reads as follows:—

"If you believe from the testimony and all the facts and circumstances in the case that the defendants or some of them purchased the property in question in good faith without knowledge of the fact that the same or some of it had been stolen, or you have any reasonable doubt of it or if you find that the prosecution has failed to prove beyond a

reasonable doubt that the defendants or some of them did buy and receive the property mentioned in the indictment or some of it, knowing it to have been stolen, or you have any reasonable doubt of it then you must acquit the defendants.”

The modification of said instruction is made by the court as follows: In the third line thereof and after the word “knowledge”, the court inserted “or belief or reasonable suspicion which they failed to investigate for fear of discovering the truth,” and also in the next to the last line of said instruction and after the word “knowing”, the court added the following, “or believing or reasonably suspecting as aforesaid.”

25.

It was error on the part of the Court to refuse to give defendants’ requested instruction No. X, which said requested instruction reads as follows:

“The jury are instructed that in cases of circumstantial evidence, such as we have in this case with reference to the defendants Charles Peterson and Walter Peterson, and Mitchell Peterson, you must not only be satisfied beyond a reasonable doubt that all the circumstances are consistent with said defendants having committed the crime alleged in the indictment, but you must also be satisfied that the facts are such as to be inconsistent with any other rational conclusion than that said defendants are guilty. If there is any single fact proved to the satisfaction of the Jury by a preponderance of the evidence, which is inconsistent with said defendants’

guilt, that is sufficient to raise a reasonable doubt and you should acquit said defendants.”

26.

It was error on the part of the Court to instruct the jury as follows:

“But, of the steer T anchor P of Dave Pambrun and of the cow branded TS of Brocky and of the steer branded CZ of Flat Tail, the evidence shows that they received those animals, that is, that there is sufficient evidence, if you believe it, to show that the defendants or some of them, received those animals from Bostwick, and that he had stolen them. All other animals than those three named and not described in the indictment, these are animals I have just been speaking to you about that are not described in the indictment at all, and the evidence was allowed to go in only upon the theory that they received them knowing them to be stolen property, it might be a circumstance from which, in connection with other evidence, you could draw an inference that they received the property described in the indictment knowing it to be stolen, of the property described in the indictment.”

27.

It was error on the part of the Court to instruct the Jury as follows:—

“If the jury believes that the defendants or any of them acted rationally, or the jury are justified in believing that the defendant or defendants acted rationally, and that whatever would carry knowledge or induce a belief in the mind of a defendant

that the property was stolen, that would induce it in the mind of a reasonable person under the same circumstances, it would, in the absence of counter-vailing evidence, be considered by you sufficient to apprise the defendant, or induce in his mind a like belief. In other words, you have a right to believe that the defendants acted as any reasonable men, a man of ordinary intelligence, would have acted under like circumstances; you have a right to believe that they could and did draw the same inferences from the circumstances and the situation that any man of ordinary intelligence would draw, and of course, it is for you to consider all the circumstances and facts surrounding the transaction to determine whether they did know."

28.

It was error on the part of the Court to instruct the Jury as follows:

"If the facts and circumstances surrounding the defendants' receipt of the property were such as would reasonably satisfy a man of their age and intelligence that the goods were stolen, or if they failed to follow up an inquiry or suspicion so suggested for fear he or they would learn the truth and find the goods were stolen, then he or they are held as strictly responsible for receiving stolen goods as though he or they had actual knowledge."

29.

It was error on the part of the Court to instruct the Jury as follows:—

"If the circumstances led the defendants or de-

fendant, either one of them, to believe that Bostwick had stolen these cattle or any of them, and if they failed to make inquiry or ascertain whose it was, or the circumstances under which Bostwick became possessed of it, because they feared they would find out he had stolen it, they would be chargeable just the same as though they had the actual and positive knowledge.”

30.

It was error on the part of the Court to instruct the Jury as follows:

“From the circumstances and the testimony, the evidence as it is before you, you must be satisfied, and they must show, beyond a reasonable doubt, that the defendant, or defendants if you find more than one of them guilty, knew the property was stolen, knew, as I have heretofore indicated to you, not necessarily the actual knowledge, but such knowledge as would put a reasonable man upon inquiry from which he could ascertain the truth.”

31.

It was error on the part of the Court to instruct the Jury as follows:

“Third, that one or more received and retained the property described, of the property in the indictment, with knowledge, belief or reasonable suspicion that he failed to investigate for fear he would learn the truth that the same had been stolen.”

32.

It was error on the part of the Court to instruct

the Jury as follows:

“You are instructed that, under the admissions of the defendants, that the gist of this evidence is whether or not the defendants, or any of them, at the time of the reception and purchase of the cattle, actually knew, believed or reasonably suspected, as aforesaid, that the same had been stolen or any of them; in order for the conviction of any one of the defendants it is necessary for the prosecution to satisfy your minds beyond a reasonable doubt that the defendants knew, believed, or reasonably suspected, as aforesaid, that the cattle had been stolen at the very time they purchased them. It is not sufficient for a conviction that the proof show that the property in question had been stolen and that it was received and branded by the defendants; it must go further and show that the defendants had knowledge, as heretofore defined to you, that the property had been stolen at the time it was purchased.”

33.

It was error on the part of the Court to instruct the Jury as follows:—

“If you believe from the testimony and all the facts and circumstances in this case that the defendants, or some of them, purchased the property in good faith, without knowledge or belief or reasonable suspicion which they failed to investigate for fear of discovering the truth of the fact that the same or some of it had been stolen, or if you have any reasonable doubt of it, or if you find that the

prosecution has feiled to prove beyond a reasonable doubt that the defendants, or some of them, did buy and receive the property mentioned in the indictment, or some of it, knowing or believing or reasonably suspecting, as before stated, it to have been stolen, or if you have any reasonable doubt of it, then you must acquit the defendants."

34.

It was error on the part of the Court to instruct the Jury as follows:

"Now, there is a circumstance along with the Connolly and Cobelle steer for you to consider in determining whether, Charles Peterson and the Petersons all of them, whether they knew that the last bunch was stolen, or whether it was sufficient to put them on enquiry as reasonable men to enquire something about the balance of that bunch. The last bunch were all stolen, some six or seven, and in that was the T anchor P steer at least, which, if you believe Bostwick, Mitchell Peterson absolutely knew that Bostwick was assuming to steal and sell to him. And that was after the Connolly and Cobelle steer settlement had been had, or after it had been discovered that they had been sold by Bostwick when they were not his. And you have a right to consider from these circumstances whether these defendants knew, or as reasonable men, knew enough to know that if they made inquiry they would have found out there were others of the steers sold before, as well as after, by Bostwick to them that were stolen. And if as reasonable men you believe

that they did, or such of them as you believe did, it will be your duty under the evidence to find them guilty of such portion of the charge, at least, as would relate to the last bunch of cattle sold."

35.

It was error on the part of the Court to instruct the Jury as follows:

"There is little reason to doubt that these incidents, as Bostwick related them to you, occurred with reference to the Cobelle and the Connolly steer, for Buck corroborates that to some extent. There is no reason to doubt that the conversation about the T anchor P steer took place, because Bostwick testifies to that, it is one of the steers that was found afterwards with the Peterson brand, if I remember the evidence aright, and that testimony is uncontradicted."

36.

It was error on the part of the Court and after said Jury had been out deliberating upon their verdict all night, and part of the day, and then had returned into court, and announced through their foreman, that they had agreed upon a verdict as to the defendant Walter Peterson, but they were unable to agree upon the two remaining defendants, for the Court to instruct said Jury as it did, as follows:—

"The Court at this time declines to receive a verdict as to one defendant. The case should be finally disposed of as to all. This is, as you know, the second trial. To try it again means to try it before

a jury drawn from the same community that you have been, and with no reason to believe that they would be any more intelligent or honest than you are, or any more likely to arrive at a verdict. Justice to both parties demands that the case be brought to an end. The expense of these trials is very great; possibly the expense of the parties so far incurred is from seven to ten thousand dollars. The government has a right to a verdict without further expenditure of time and money. The defendants if guilty have a right to have that fact determined by a verdict before they are bankrupt in pocket, and likewise if innocent they have a right to be acquitted before their means are exhausted. You state in answer to the Courts' question that you stand seven to five. If seven are for acquittal the five should seriously enquire whether there is not a reasonable doubt of the guilt of the defendants when seven of their fellows of equal intelligence and honesty have found that there is; if seven are for conviction the five should equally seriously enquire whether there is a reasonable doubt of the guilt of the defendants when seven of their fellows of equal intelligence and honesty find there is no doubt. After three days spent in the trial of this case, with no reason to believe that it can be any better tried before another jury, the Court is disposed to direct you to further consider the case, believing that you can honestly come to an agreement. You may retire."

W. F. O'LEARY and

E. A. CARLETON,

Attorneys for Defendant.

Due service of the foregoing Assignment of Errors is hereby admitted this 11th day of August, 1913.

J. W. FREEMAN,

United States District Attorney.

(Indorsed): Title of Court and Cause. Assignment of Errors. Filed August 11th, 1913. Geo. W. Sproule, Clerk.

And thereafter, and on the 11th day of August, 1913, the said defendant duly filed his petition for a Writ of Error herein, and which said petition is in the words and figures, as follows, to-wit:

(TITLE OF COURT AND CAUSE.)

PETITION FOR WRIT OF ERROR.

Comes now the defendant, Mitchell Peterson, and petitions this Court for a writ of error herein, and says:

That on or about the 29th day of March 1913, the above entitled Court entered a judgment herein against the defendant, wherein the said defendant was sentenced to be confined and imprisoned in the United States Penitentiary at Leavenworth, in the state of Kansas, for the term of one year at hard labor and to pay a fine of \$200 and costs, taxed in the sum of \$1189.35 for the alleged offense of the violation of the laws of the United States respecting the buying and receiving of stolen property knowing it to have been stolen; that in said judgment and the proceedings had prior thereto in

said cause, certain errors were committed to the prejudice of this defendant, all of which will more fully appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals, for the Ninth Circuit; for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit at the City of San Francisco, in the State of California.

W. F. O'LEARY and

E. A. CARLETON,

Attorneys for Defendant.

Service accepted August 11, 1913.

J. W. FREEMAN,

U. S. Attorney.

(Indorsed): Title of Court and Cause. Petition for Writ of Error. Filed Aug. 11th 1913. Geo. W. Sproule, Clerk.

And thereafter, and on the 11th day of August, 1913, an order allowing said Writ of Error was duly made and entered herein, which said order is in the words and figures as follows, to-wit:

(TITLE OF COURT AND CAUSE.)

ORDER ALLOWING WRIT OF ERROR.

On this 11th day of August, 1913, comes the defendant, Mitchell Peterson, by his attorneys, and

files herein and presents to the court his petition, praying for the allowance of a writ of error and an assignment of errors intended to be urged by him, and praying, also, that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be presented to the United States Circuit Court of Appeals, Ninth Circuit, and that such other and further proceedings may be had as are meet and proper in the premises.

In consideration whereof the Court does allow the writ of error upon the defendant giving bond according to law in the sum of \$2000.00 and that upon the due execution and approval of said bond, the same shall act as a supercedeas herein.

GEO. M. BOURQUIN,

Judge.

(Indorsed.): Title of Court and Cause. Order Allowing Writ of Error. Filed and Entered in Order Book Aug. 11, 1913. Geo. W. Sproule, Clerk.

And thereafter, and on the 16th day of August, 1913, the defendant duly filed his bond on writ of error, and which said Bond is in the words and figures as follows, to-wit:

(Title of Court and Cause.)

BOND.

KNOW ALL MEN BY THESE PRESENTS, that we, Mitchell Peterson as principal and Edward T. Broadwater and Simon Pepin of the State of Montana, as securities are held and firmly bound

unto the United States of America in the full sum of \$2000. to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 11th day of August, 1913.

WHEREAS, lately, at the District Court of the United States for the District of Montana, in a suit depending in said Court between the United States of America as plaintiff and Mitchell Peterson as defendant, a judgment was entered against the defendant sentencing him to be confined and imprisoned at the United States Penitentiary at the city of Leavenworth, in the State of Kansas, for the term of one year at hard labor, and that he pay a fine of \$200, and costs, taxed in the sum of \$1189.35; and,

WHEREAS, the defendant, Mitchell Peterson, is desirous of prosecuting an appeal from the judgment and sentence of said United States District Court to the United States Circuit Court of Appeals, for the Ninth Circuit, at the city of San Francisco, in the State of California, and has obtained a writ of error therefor, and filed a copy thereof in the office of the Clerk of said District Court of the United States, to reverse the judgment in the aforesaid suit, and a citation, directed to the United States of America and to the Attorney General of the United States, citing said parties to be and ap-

pear at a session of the United States Circuit Court of Appeals, for the Ninth Circuit, to be heard at the City of San Francisco, in the State of California, within sixty days from the 16th day of August, 1913.

Now, the condition of the above obligation is such that if the said defendant, Mitchell Peterson, shall prosecute said writ of error to effect and answer all demands and costs if he fail to make said appeal good, then the above obligation to be void. Otherwise to be in full force and virtue.

MITCHELL PETERSON. (Seal.)

EDWARD T. BROADWATER, (Seal.)

SIMON PEPIN. (Seal.)

UNITED STATES OF AMERICA,

State of Montana,

County of Hill.—ss.

Edward T. Broadwater and Simon Pepin sureties to the foregoing bond, being each duly severally sworn, each for himself says:

That he is responsible, and a freeholder or householder within the State of Montana, and is worth the sum specified in the foregoing undertaking as a penalty thereof over and above all his just debts and liabilities and property exempt by law from execution.

EDWARD T. BROADWATER,
SIMON PEPIN

Subscribed and sworn to before me this 13 day of August, 1913.

CHAS. A. ROSE,
Notary Public for the State of Montana,

residing at Havre, Montana. My Commission expires on the 18 day of April, 1916.

(Notarial Seal.)

Aproved. GEO. M. BOURQUIN,
Judge.

(Endorsed): Title of Court and Cause. Bond.
Filed August 16th, 1913. Geo. W. Sproule, Clerk.

Thereafter on Aug. 16th, 1913, a Writ of Error was duly issued and filed herein, which is annexed hereto and is in the words and figures as follows, to-wit:

*In the District Court of the United States, District
of Montana.*

UNITED STATES OF AMERICA,

Plaintiff.

vs.

MITCHELL PETERSON,

Defendant.

Writ of Error.

The President of the UNITED STATES OF AMERICA, to the Judge of the District Court of the United States, for the District Montana,
GREETING:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said District Court of the United States for the District of Montana, before you, between the United States of America, and Mitchell Peterson, manifest errors hath happened, to the great damage of the said Mitchell Peterson, as by his complaint and the record herein appears, and it being fit

that the errors, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, to be held at the City of San Francisco, California, together with this writ, so that you may have the same at the said City of San Francisco, California, within thirty days from the date of this writ, in the said United States Circuit Court of Appeals, to be there and then held, that the record and proceedings aforesaid may be inspected, and said United States Circuit Court of Appeals may cause further to be done therein to correct said errors, if any, and to do what of right and according to the law and custom of the United States should be done.

WITNESS, the Honorable E. D. White, Chief Justice of the United States, this 16th day of August, in the year of our Lord One Thousand Nine Hundred and Thirteen, and of the Independence of the United States, the One Hundred and Thirty-eighth.

GEO. W. SPROULE,

Clerk of the District Court of the

United States, for the District of Montana.

(Seal.)

Due service of the within writ of error is hereby

admitted this 16th day of August, 1913.

J. W. FREEMAN,

United States District Attorney.

Return of Writ of Error.

The answer of the Judge of the District Court of the United States, for the District of Montana.

The record and all proceedings of the plaintiff in error wherein mention is within made, with all things touching the same I hereby certify, under the seal of said Court, to the United States Circuit Court of Appeals for the Ninth Circuit within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded. By the Court:

GEO. W. SPROULE,

Clerk.

By C. R. GARLOW,

Deputy Clerk.

(Endorsed): Filed Aug. 16th, 1913, Geo. W. Sproule, Clerk.

And thereafter, and on the 16th day of August, 1913, a Citation herein was duly issued and filed and which is annexed hereto, and being in the words and figures following, to-wit:

*In the District Court of the United States, District
of Montana.*

UNITED STATES OF AMERICA,

Plaintiff.

vs.

MITCHELL PETERSON,

Defendant.

CITATION.

UNITED STATES OF AMERICA.—ss.

The President of the United States to the United States of America, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States, for the District of Montana wherein Mitchell Peterson is plaintiff in error and the United States of America is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned, should not be corrected, and speedy justice should not be done, to the parties in that behalf.

Witness, the Honorable Geo. M. Bourquin, Judge of the District Court United States for the District of Montana and the seal of said District Court, this 16th day of August, 1913.

GEO. M. BOURQUIN,

United States District Judge presiding in the
said District Court of the State of Montana.

Attest: GEO. W. SPROULE, Clerk.

W. F. O'LEARY,

E. A. CARLETON,

Attorneys for Defendant.

Service of the foregoing citation is hereby admitted this 16th day of August, 1913.

J. W. FREEMAN,

United States District Attorney.

(Endorsed): Title of Court and Cause. Citation
Filed August 16th, 1913. Geo. W. Sproule, Clerk.

Clerk's Certificate to Transcript of Record.
United States of America,
District of Montana.—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing Volume, consisting of Two hundred and six pages, numbered consecutively from one to two hundred and six, is a true and correct transcript of the pleadings, appearances, orders, judgment, and all proceedings had in said cause, and the whole thereof, as appears from the original records and files of said Court in my possession; and I do further certify and return that I have annexed to said transcript the original Writ of Error and Citation, in said cause with admission of service thereof.

I further certify that the costs of the transcript of the record amount to the sum of \$25.60, and have been paid by the plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said United States District Court, District of Montana, this 9th day of September, A. D. 1913.

GEO. W. SPROULE,

Clerk.

By C. R. GARLOW,

Deputy Clerk.

(Seal.)

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United States
Circuit Court of Appeals

For the Ninth Circuit.

MITCHELL PETERSON,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief for Plaintiff in Error.

STATEMENT OF CASE.

The plaintiff in error, Mitchell Peterson, brings this cause to this Court by a writ of error sued out of the District Court of the State of Montana. In the lower court, judgment was rendered against him upon a verdict of guilty, and he was sentenced to a term of one year and one day at hard labor in the Federal Penitentiary at Leavenworth, Kansas, and

to pay the costs of the prosecution, taxed in the sum of \$1189.35.

Rec. 17.

The indictment, which is in four counts, charges defendants with buying and receiving some forty-four head of cattle, *knowing* them to have been stolen.

Rec. 2-7.

The jury found plaintiff in error guilty as charged in Count One of the indictment, and not guilty as to the three remaining counts "and recommend the greatest clemency by the Court."

Rec. 14.

In imposing the sentence it did, the Court entirely disregard the recommendation of the jury for clemency and fixed the punishment as stated.

Defendant, Mitchell Peterson, was convicted of buying and receiving only three head of cattle, as charged in Count One, out of forty-four head charged.

Rec. 2 and 14.

The three head which he was found guilty of buying and receiving, knowing them to have been stolen, were property of Indians, wards of the Government, and are thus described:

One steer, branded "25" on the left ribs, of the property of Calf Looking, an Indian person;

One cow, branded \int on the left thigh, of the property of Catches Two, an Indian person; ~~#~~

One cow, branded \overline{OO} on the left hip of the

~~#~~ "One cow, branded 17 on the left ribs of the property of Bad Marriage."

property of Henry No Bear, an Indian person.

Rec. 23.

Plaintiff in error, as the record shows, page 9, was jointly indicted with four others, his father, Charles Peterson, and Walter, Oscar and Melvin Peterson, his brothers. The case had been tried before by the Hon. Carl Rasch, then District Judge, with the result that Oscar and Melvin were acquitted and the three remaining defendants, convicted. Judge Rasch granted a new trial. This writ of error is sued out on the conviction of the plaintiff in error at the second trial before the Hon. Geo. M. Bourquin, the successor of Judge Rasch, the second trial having been held in March, 1913.

Rec. 32.

Charles, the father and Walter, the brother, were duly acquitted at the second trial.

Rec. 15.

The indictment was returned Dec. 21st, 1910, which charged the offense as having been committed "on the 21st day of October, A. D. 1910" upon the Blackfeet Indian Reservation, in Montana.

Rec. 2-9.

All the original defendants, except Charles Peterson, the father, are wards of the Government and carried on the rolls at the Indian Agency as such.

On March, 24, 1913, plaintiff in error filed a motion, supported by a number of affidavits, to dismiss the case, for lack of seasonable prosecution, in

which it was made to appear, among other things, that from Oct. 14th, 1911, when defendant's motion for a new trial was granted, (Rec. 19), down to March, 26th, 1913, when the case was tried for the second time, (Rec. 32), that three terms of Court had been held with a jury, at any one of which this case could have been tried "if it was ever intended or desired" to try plaintiff in error again.

Rec. 19.

It is made to appear in the affidavits filed in support of the motion to dismiss, that the long delay in bringing said cause to trial was wholly due to the prosecution and that appellant, at all times, has been anxious to have said case disposed of.

Rec. 21; 24-27.

The Court declined to entertain or hear the motion to dismiss and ordered the jury empaneled. A jury being empaneled, and a witness called and sworn, counsel for appellant objected to the introduction of any testimony for the reasons stated in the aforesaid motion. The objection being overruled, an exception was taken. The foregoing transactions were settled in a bill of exceptions and are designated in the record as Bill of Exceptions No. 1.

Rec. 27-31.

At about the hour of 4 P. M. of March 28, 1913, the jury retired to consider their verdict and in the evening of said day, returned into Court for further instructions, which being given, they again retired to deliberate upon their verdict. After remaining

out all night and on March 29th, at 11 A. M., they again returned into Court and reported a verdict as to defendant, Walter Peterson, and a disagreement as to Mitchell Peterson and his co-defendant, Charles Peterson. Thereupon the Court addressed the jury as follows:

“The Court at this time declines to receive a verdict as to one defendant. The case should be finally disposed of as to all. This is, as you know, the second trial. To try it again means to try it before a jury drawn from the same community that you have been, and with no reason to believe that they would be any more intelligent or honest than you are or any more likely to arrive at a verdict. Justice to both parties demands that the case be brought to an end. The expense of these trials is very great; possibly the expense of the parties so far incurred is from seven to ten thousand dollars. The government has a right to a verdict without further expenditure of time and money. The defendants, if guilty, have a right to have that fact determined by a verdict before they are bankrupt in pocket, and likewise if they are innocent they have a right to be acquitted before their means are exhausted. You state to the Court that you stand seven to five. If seven are for an acquittal the five should seriously enquire whether there is not a reasonable doubt of the guilt of the defendants when seven of their fellows of equal intelligence and honesty have found that there is; if seven are for

conviction the five should equally seriously enquire whether there is a reasonable doubt of the guilt of the defendants when seven of their fellows of equal intelligence and honesty find there is no doubt. After three days spent in the trial of this case, with no reason to believe that it can be any better tried before another jury, the Court is disposed to direct you to further consider the case, believing that you can honestly come to an agreement. You may retire.”

Rec. 175-176.

To which remarks and instructions of the Court, counsel for the plaintiff in error duly excepted in so far as the same related to the cost or expense of the litigation, which said exception was duly allowed by the Court.

Rec. 176.

The several questions involved relate to the aforesaid action and rulings of the Court in (a) declining to entertain or hear the motion to dismiss the case; (b) to overruling the objection to the introduction of any testimony; (c) to instructing the jury as it did as to the cost of the prosecution of the case and after the jury had reported a disagreement as to appellant, and are raised by the exceptions taken which have been settled in the several bills of exceptions. The other questions involved relate to the numerous exceptions to the rulings of the Court in admitting evidence and in sustaining objections to questions asked by counsel for plaintiff

in error, and are raised by proper exceptions to said rulings, as fully appears in the Specifications of Error. Likewise, and particularly, exceptions to many of the instructions of the Court, as also exceptions to the refusal of the Court to give certain requested instructions. There is also involved the sufficiency of the evidence to sustain a conviction in this case, which is raised by the writ of error.

Still another question involved is the question of the integrity of the judgment in the absence of an affirmative showing that defendant below was arraigned and plead to the indictment.

SPECIFICATIONS OF ERROR.

1. It was error on the part of the Court to refuse to entertain or hear the motion to dismiss the case.

Rec. 27-29.

2. It was error on the part of the Court to refuse to dismiss the case.

Rec. 27-29.

3. It was error on the part of the Court to overrule appellant's objection to the introduction of any testimony.

Rec. 30-34.

4. It was error on the part of the Court to allow testimony calculated to show the larcency of other animals than those described in the indictment.

Rec. 37 and 39-40

5. It was error on the part of the Court to overrule the objection to the question found on page 39 of the Rec., as follows:

Q. And the cow branded,—and the steer branded CZ of Flat Tail?

A. This steer was branded Y bar K on the left ribs.

Rec. 39.

6. It was error on the part of the Court to overrule the objection to the following question:

Q. I will ask you whether or not in that bunch you found a cow branded HM on the left hip?

A. Yes, sir.

Rec. 40-41.

7. It was error on the part of the Court to overrule the objection to the following question:

Q. State whether or not you found a brand,—P lazy S on the left shoulder, a cow?

A. Yes, sir.

Rec. 41.

8. It was error on the part of the Court to overrule the objection to the following question, found at the bottom of page 41 of the record, as follows:

Q. State whether or not among that bunch you also found a steer branded E2, the 2 combined with the top of the E, on the left shoulder?

A. The E2 brand belongs to an Indian by the name of Young Running Crane. There was a

Y—K brand upon it at that time.

Rec. 42.

Note: Attention is called to the fact that, at this point in the record, counsel for appellant, asked that the record show that appellant objected to the introduction of all testimony regarding any animals not described in the indictment herein and that they save an exception to the ruling of the Court in each instance in admitting such testimony.

Rec. 42.

9. It was error on the part of the Court to sustain the objection to the following question, asked of Indian Agent, McFatrige:

Q. At that time you had not formed any opinion or purpose to prosecute the Petersons for stealing that stock?

Rec. 56.

10. It was error on the part of the Court to sustain the objection to the following question asked the witness Joe Brown:

Q. Some Bostwick stock had been shipped before?

Rec. 61.

11. It was error on the part of the Court to overrule the objection to the following question asked the witness Joe Brown:

Q. Among these cattle that were driven in from the defendants state whether or not there was an animal branded MF belonging to Frank Monroe?

Rec. 61-62.

12. It was error on the part of the Court to overrule the objection to the following question found near the top of page 62 of the record:

Q. State also whether or not there was an animal branded JT?

Rec. 62.

13. It was error on the part of the Court to sustain the objection to the following question:

Q. You don't know whether it had been sold or disposed of or not?

Rec. 62.

14. It was error on the part of the Court to overrule the objection to the following question asked of witness Old Rock:

Q. Can you tell us the brand of the cattle, your brand?

Rec. 63.

15. It was error on the part of the Court to overrule the objection to the following question asked of said witness:

Q. I will get you to state whether you were down at the Agency the first part of November of 1910 about two years ago?

A. I was.

Rec. 63.

16. It was error on the part of the Court to overrule the objection to the following question:

Q. Did you find any of your cattle there?

A. Yes sir.

Rec. 64.

17. It was error on the part of the Court to refuse to strike out all of the testimony of the witness Old Rock, as found on pages 62-64 of the record.

Rec. bottom page 64.

18. It was error on the part of the Court to sustain the objection to the following question asked of the witness Dave Pambrum:

Q. You never accused any of these defendants of stealing it?

Rec. 66.

19. It was error on the part of the Court to sustain the objection to the question asked of the witness Henry Marceau:

Q. You never accused any of these defendants of stealing it?

Rec. 68.

20. It was error on the part of the Court to refuse to strike out all the testimony of the witness Louis Monroe, as contained on pages 74 and 75 of the record.

Rec. 74-75.

21. It was error on the part of the Court to overrule the objection to the following question asked of the witness Albert Goss:

Q. State whether or not there was any difference of opinion between all of you there including the Petersons as to the brands there were upon these animals and which Joe Brown put down in his book?

A. There was no difference of opinion.

Rec. 80.

22. It was error on the part of the Court to overrule the objection to the question asked of Matt Lytle:

Q. What have you to say as to whether or not you all agreed as to the brands that were upon these cattle as they went through the chute.

Rec. bottom 83 and top 84.

23. It was error on the part of the Court to overrule the objection to the following question asked of the witness Bostwick:

Q. Can you give us a description of any other cattle of this 6 or 7 head branded there on the 21st of October besides the 25 and the 17 and the TS and the OO?

A. Yes, an R steer I think, and an MW cow and the T anchor P steer.

Rec. 98.

23. It was error on the part of the Court to allow any testimony regarding the T anchor P steer.

Rec. 98.

24. It was error on the part of the Court to overrule the objection to the following question asked of the witness Joe Brown:

Q. Mr. Brown I will ask you whether or not in this bunch of cattle testified to as being driven from the Peterson field to the government field and there examined whether or not there was a steer in

that bunch belonging to Dick Kipp?

A. Yes sir. On the steer as I have it the brand is an AK; there was also the Y—K brand on the left ribs. That was ID stuff also.

Rec. 126.

25. It was error on the part of the Court to overrule the motion of plaintiff in error at the close of the testimony in the case to dismiss the same or to instruct the jury to return a verdict of not guilty.

Rec. 127-128.

ERRORS IN INSTRUCTIONS.

26. It was error on the part of the Court to refuse to give defendant's requested instruction No. 1, and likewise error to give said instruction as modified by the court, which said requested instruction is as follows:

The court instructs the jury that before you can convict any of the defendants you must first be satisfied beyond a reasonable doubt of the truth of three propositions, viz:

First. That the property described in the indictment, or some of it, was stolen in the manner and form as charged in the indictment.

Second. That one or more of the defendants received or retained it in his or their possession, with intent to convert it to his or their own use or gain.

Third. That one or more of the defendants received or retained the property described in the

indictment, or some of it, with knowledge that the same had been stolen.

Each of these three propositions must be proven to your satisfaction beyond a reasonable doubt, and if you have any reasonable doubt as to the truth of any of them you must give the defendants the benefit of such doubt, and acquit.

The Court modified the foregoing instruction by inserting therein, after the word "knowledge," in the third division thereof, the following, "belief or reasonable suspicion which he failed to investigate for fear he would learn the truth."

Rec. 182-183.

27. It was error upon the part of the Court to refuse to give defendant's requested instruction No. II, which requested instruction reads as follows:

You are instructed that as to the question of whether or not the defendants, or any of them, had knowledge, that at the time they received said property described in the indictment or any of it, and when the same had been stolen, must be actual knowledge, and not mere suspicion or guess that the same had been stolen. And unless you so find from the evidence and all the facts and circumstances in this case and your minds shall be satisfied beyond a reasonable doubt that the defendants did have such actual knowledge at the very time they did if such is the fact that they did receive stolen cattle, receive any stolen cattle, then it is your sworn duty to acquit.

Rec. 183.

28. It was error on the part of the Court to refuse to give defendants' requested instruction No. III, which requested instruction reads as follows:

You are instructed that the statute, under which these defendants are prosecuted, makes knowledge upon the part of the defendants of the fact that they were stolen property, an indispensable condition of conviction.

And even, though you should find that all or any part of the property in question was stolen and that all or any part of it was received by the defendants or any one of them, still, neither of those facts is sufficient for a conviction in this case. In affairs of ordinary business it sometimes happens, as we all know, that people honestly buy and receive stolen property in ignorance of the fact that it has been stolen. But that is no crime, and it is not the offense for which these defendants are on trial.

In considering the question of whether or not these defendants or any one of them, did have actual knowledge of the fact that any of the cattle in question were stolen, if you find any of them were stolen, and at the time the same or any portion of them were received, it is proper for you to take into consideration, the circumstances when they were received and the manner of dealing between the defendants and the seller, as to whether or not they were received openly in the day time or secret-

ly in the night time, and as to whether or not said cattle were secreted or hidden and whether or not the transaction was what we call a secret one, and whether or not the cattle were secreted, and on the other hand, whether or not the cattle were branded in broad day light and were turned upon the open range and where people could readily see them in passing, and you should likewise take into consideration whether or not a fair price for the same was paid or whether it was a price below the reasonable value of said property. And you may also consider as to whether or not the defendants denied receiving or having said goods and how they dealt and used them, if they did receive them.

You also have a right and it is your duty to consider whether or not it has been shown that these defendants were in the habit of buying stolen property knowing the same to have been stolen, and take into consideration their business and circumstances in life, as likewise whether or not the defendants or any one of them were engaged in the buying and selling of cattle in an honest and legitimate way.

You should likewise take into consideration whether or not the defendants actually knew, at the time they had the dealings in question, with the witness Bostwick, that he had been previously engaged in stealing and selling cattle as likewise whether or not said Bostwick was a person, to the knowledge of these defendants, who would be apt to sell stolen property, together with all the other facts and cir-

circumstances and the evidence in the case, and if after considering the entire evidence you have a reasonable doubt, you must acquit.

Rec. 183-185.

29. It was error upon the part of the court to refuse to give defendants' requested instruction No. IV, and likewise error to modify said requested instruction as the court did, and to give the same as modified. Said requested instruction reads as follows:

You are instructed that under the admissions of the defendants that the gist of this offense is whether or not the defendants or any of them at the time of the reception and purchase of the cattle, they actually knew that the same had been stolen or any of them. In order for a conviction of any one of the defendants it is necessary for the prosecution to satisfy your minds beyond a reasonable doubt that the defendants knew that the cattle had been stolen at the very time they purchased them. It is not sufficient for a conviction that the proof show that the property in question had been stolen and that it was received and branded by the defendants.

The Court modified said instruction by inserting after the word "knew," in line four thereof, the following, "believed or reasonably suspected as aforesaid," and also added to said requested instruction, after the word "knew" in the seventh line thereof, the following, "believed or reasonably

suspicioned as aforesaid.”

Rec. 185-186.

30. It was error on the part of the Court to refuse to give defendants’ requested instruction No. VI, which requested instruction reads as follows:

You are instructed that in considering the evidence, that if you can reasonably account for any fact in this case upon a theory or hypothesis which will admit of the defendants’ innocence, it is your duty, under the law, to do so, and if you have any reasonable doubt of the guilt of any one or all of the defendants, you should give such defendant or defendants the benefit of such doubt and acquit.

Rec. 186-187.

31. It was error on the part of the Court to refuse to give defendants’ requested instruction No. VII, which said instruction reads as follows:

The jury are instructed that the uncorroborated testimony of an accomplice is not sufficient to convict in this case. By an accomplice is meant one who aids, abets or assists in the commission of some crime. And if you find from the testimony and all the circumstances in the case that the witness, John Bostwick, was an accomplice under the definition above given, and that his testimony is not corroborated, then you should acquit, unless you are satisfied beyond a reasonable doubt of the guilt of one or more of the defendants by other testimony.

Rec. 187.

32. It was error on the part of the Court to

refuse to give defendants' requested instruction No. IX, and likewise error to give the same as modified by the Court. Said instruction No. IX reads as follows:

If you believe from the testimony and all the facts and circumstances in the case that the defendants or some of them purchased the property in question in good faith without knowledge of the fact that the same or some of it had been stolen, or you have any reasonable doubt of it or if you find that the prosecution has failed to prove beyond a reasonable doubt that the defendants or some of them did buy and receive the property mentioned in the indictment or some of it, knowing it to have been stolen, or you have any reasonable doubt of it then you must acquit the defendants.

The modification of said instruction is made by the court as follows: In the third line thereof and after the word "knowledge," the court inserted "or belief or reasonable suspicion which they failed to investigate for fear of discovering the truth," and, also in the next to the last line of said instruction and after the word "knowing," the court added the following, "or believing or reasonably suspecting as aforesaid."

Rec. 187-188.

33. It was error on the part of the Court to refuse to give defendants' requested instruction No. X, which said requested instruction reads as follows:

The jury are instructed that in cases of circumstantial evidence, such as we have in this case with reference to the defendants Charles Peterson and Walter Peterson, and Mitchell Peterson, you must not only be satisfied beyond a reasonable doubt that all the circumstances are consistent with said defendants having committed the crime alleged in the indictment but you must also be satisfied that the facts are such as to be inconsistent with any other rational conclusion than that said defendants are guilty. If there is any single fact proved to the satisfaction of the jury by a preponderance of the evidence, which is inconsistent with said defendants' guilt, that is sufficient to raise a reasonable doubt and you should acquit said defendants.

Rec. 188-189.

34. It was error on the part of the Court to instruct the jury as follows:

But, of the steer T anchor P of Dave Pambrum and of the cow branded TS of Brocky and of the steer branded CZ of Flat Tail, the evidence shows that they received those animals, that is, that there is sufficient evidence, if you believe it, to show that the defendants or some of them, received those animals from Bostwick, and that he had stolen them. All other animals than those three named and not described in the indictment, these are animals I have just been speaking to you about that are not described in the indictment at all, and the evidence was allowed to go in only upon the theory that they

received them knowing them to be stolen property, it might be a circumstance from which, in connection with other evidence, you could draw an inference that they received the property described in the indictment knowing it to be stolen, of the property described in the indictment.

Rec. 189.

35. It was error on the part of the Court to instruct the jury as follows:—

If the jury believes that the defendants or any of them acted rationally, or the jury are justified in believing that the defendant or defendants acted rationally, and that whatever would carry knowledge or induce a belief in the mind of a defendant that the property was stolen, that would induce it in the mind of a reasonable person under the same circumstances, it would, in the absence of counter-vailing evidence, be considered by you sufficient to apprise the defendant, or induce in his mind a like belief. In other words, you have a right to believe that the defendants acted as any reasonable men, a man of ordinary intelligence, would have acted under like circumstances you have a right to believe that they could, and did draw the same inference from the circumstances and the situation that any man of ordinary intelligence would draw, and of course, it is for you to consider all the circumstances and facts surrounding the transaction to determine whether they did know.

Rec. 189-190.

36. It was error on the part of the Court to instruct the jury as follows:

If the facts and circumstances surrounding the defendants' receipt of the property were such as would reasonably satisfy a man of their age and intelligence that the goods were stolen, or if they failed to follow up an inquiry or suspicion so suggested for fear he or they would learn the truth and find the goods were stolen, then he or they are held as strictly responsible for receiving stolen goods as though he or they had actual knowledge.

Rec. 190.

37. It was error on the part of the Court to instruct the jury as follows:

If the circumstances led the defendants or defendant, either one of them, to believe that Bostwick had stolen these cattle or any of them, and if they failed to make inquiry or ascertain whose it was, or the circumstances under which Bostwick became possessed of it, because they feared they would find out he had stolen it, they would be chargeable just the same as though they had the actual and positive knowledge.

Rec. 190-191.

38. It was error on the part of the Court to instruct the jury as follows:

From the circumstances and the testimony, the evidence as it is before you, you must be satisfied, and they must show, beyond a reasonable doubt, that the defendant, or defendants if you find more than

one of them guilty, knew the property was stolen, knew, as I have heretofore indicated to you, not necessarily the actual knowledge, but such knowledge as would put a reasonable man upon inquiry from which he could ascertain the truth.

Rec. 191.

39. It was error on the part of the Court to instruct the jury as follows:

Third, that one or more received and retained the property described, of the property in the indictment, with knowledge, belief or reasonable suspicion that he failed to investigate for fear he would learn the truth that the same had been stolen.

Rec. 191.

40. It was error on the part of the Court to instruct the jury as follows:

You are instructed that, under the admissions of the defendants, that the gist of this evidence is whether or not the defendants, or any of them, at the time of the reception and purchase of the cattle, actually knew, believed or reasonably suspected, as aforesaid, that the same had been stolen or any of them; in order for the conviction of any one of the defendants it is necessary for the prosecution to satisfy your minds beyond a reasonable doubt that the defendants knew, believed, or reasonably suspected, as aforesaid, that the cattle had been stolen at the very time they purchased them. It is not sufficient for a conviction that the proof show

that the property in question had been stolen and that it was received and branded by the defendants; it must go further and show that the defendants had knowledge, as heretofore defined to you, that the property had been stolen at the time it was purchased.

Rec. 191-192.

41. It was error on the part of the Court to instruct the jury as follows:

If you believe from the testimony and all the facts and circumstances in this case that the defendants, or some of them, purchased the property in good faith without knowledge or belief or reasonable suspicion which they failed to investigate for fear of discovering the truth of the fact that the same or some of it had been stolen, or if you have any reasonable doubt of it, or if you find that the prosecution has failed to prove beyond a reasonable doubt that the defendants, or some of them, did buy and receive the property mentioned in the indictment, or some of it, knowing or believing or reasonably suspecting, as before stated, it to have been stolen, or if you have any reasonable doubt of it, then you must acquit the defendants.

Rec. 192-193.

42. It was error on the part of the Court to instruct the jury as follows:

Now, there is a circumstance along with the Connolly and Cobelle steer for you to consider in determining whether, Charles Peterson and the

Petersons all of them, whether they knew that the last bunch was stolen, or whether it was sufficient to put them on enquiry as reasonable men to enquire something about the balance of that bunch. The last bunch were all stolen, some six or seven, and in that was the T anchor P steer at least, which, if you believe Bostwick, Mitchell Peterson absolutely knew that Bostwick was assuming to steal and sell to him. And that was after the Connolly and Cobelle steer settlement had been had, or after it had been discovered that they had been sold by Bostwick when they were not his. And you have a right to consider from these circumstances whether these defendants knew, or as reasonable men, knew enough to know that if they made inquiry they would have found out there were others of the steers sold before, as well as after, by Bostwick to them that were stolen. And if as reasonable men you believe that they did, or such of them as you believe did, it will be your duty under the evidence to find them guilty of such portion of the charge, at least, as would relate to the last bunch of cattle sold.

Rec. 193-194.

43. It was error on the part of the Court to instruct the jury as follows:

There is little reason to doubt that these incidents, as Bostwick related them to you, occurred with reference to the Cobelle and the Connolly steer, for Buck corroborates that to some extent. There is no reason to doubt that the conversation about the

T anchor P steer took place, because Bostwick testifies to that, it is one of the steers that was found afterwards with the Peterson brand, if I remember the evidence aright, and that testimony is uncontradicted.

Rec. 194.

44. It was error on the part of the Court and after the jury in the case had been out all night deliberating on their verdict, and a part of the following day, and having returned into court, and having announced through their foreman, that they had agreed upon a verdict, as to the defendant Walter Peterson, and disagreed as to plaintiff in error, to make the remarks which the Court made, as found in the record in this case at the bottom of page 194 and top of page 195, and which remarks are also found in this brief on page 5—6....

ARGUMENT.

While numerous errors are assigned in the brief, for convenience of argument, they may be practically all considered under six heads as follows:

First, did plaintiff in error have a speedy trial within the meaning of the Federal Constitution?

Second, was the great volume of testimony allowed to go in, over objection, tending to show larceny of other cattle not charged in the indictment and concerning which plaintiff in error had

no notice or opportunity to prepare for trial, competent under this indictment?

Third, was error committed in the instructions wherein the jury were told that *actual knowledge* that the cattle had been stolen, was not necessary to convict, but that if they had a “reasonable suspicion” that they had been stolen or failed to follow up any suspicion they had, for fear they would learn the truth, that was sufficient.

And, likewise, was error committed by the refusal of the Court to give certain requested instructions?

Fourth, did the Court commit reversible error in making the remarks it did to the jury, under the circumstances, wherein it told them of the immense cost of the prosecution as an inducement to get them to agree to a verdict. (The record shows that within less than one hour after said remarks were made the jury did agree.) (Rec. 176-177.), and that the conviction of defendant was brought about by them.

Fifth, is the evidence sufficient to sustain a verdict of conviction in this case?

Sixth, can a judgment in a criminal case, pronounced upon a verdict of guilty on a felony charge, be upheld, when the record fails to affirmatively show an arraignment or plea of the defendant?

Upon all six of these points, save, perhaps, the first, we shall respectfully insist that the judgment ought not to be upheld and that the case should be

sent back for another trial.

SPEEDY TRIAL.

As to the first point, that of a speedy trial, much might be said in the light of Article VI of Amendments to the Constitution, which reads:

“In a criminal prosecution the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.”

In the preceding article, 5, it is provided, *inter alia*, that no person “shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property, without due process of law.”

A motion to dismiss raises the question as to what is a speedy trial. Chief Justice Wade in the case of the United States against Fox, 3 Mont. 516, defines the meaning of the term within the constitutional provision, where he says:

“But both the constitution and the law contemplate that the trial should be had, after a lapse

of such time as, in the exercise of reasonable diligence, may be required to prepare for trial.” And again on page 517 he says: “And so on the other hand the law will not tolerate any neglect or laches on the part of the prosecution in bringing the defendant to trial. * * * A person charged with crime, whether in prison or on bail, has the right to demand diligence on the part of the prosecution, to the end that he may speedily know whether he is to be convicted or acquitted.”

And further on the same page he says: “A speedy trial, to which a person charged with crime is entitled under the Constitution then is, a trial at such a time, after the finding of the indictment, regard being had to the terms of court, as shall afford the prosecution a reasonable opportunity, by a fair and honest exercise of reasonable diligence, to prepare for trial, and if the trial is delayed or postponed beyond such period when there is a term of court at which the trial might be had, by reason of the neglect or laches of the prosecution in preparing for trial, such delay is a denial to the defendant of his right to a speedy trial.”

To the same effect is *ex parte Stanley*, 4 ^{New} ~~New~~ York, 116; *Klock vs. the People*, 2 Park. 676. While there is no Federal Statute, that I am aware of that provides a specific time within which trial must be had, the Statutes of different states do provide such a time, and if a trial is not had within such a time, the court must dismiss the prosecu-

tion. Section 9520 of the Penal Code of the State of Montana provides as follows: "The Court unless good cause to the contrary is shown, must order the prosecution dismissed in the following cases:

I. Where a person has been held to answer for a public offense, if the information is not filed against him, within thirty days thereafter, or such time has not been extended by the Court or judge.

II. If a defendant, whose trial has not been postponed upon his application, is not brought to trial within six months after the filing of the indictment or filing of the information."

California has the same provision. Sec. 1382, Penal Code of California. In the case of *Beavers vs. Haubert*, 198 U. S. on page 86, the court says:

"Undoubtedly the defendant is entitled to a speedy trial and by a jury of the district where it is alleged the offense was committed. This is the injunction of the constitution." These provisions of the different states the courts hold to be mandatory.

People vs. Morino, 85 Cal. 515, 24 Pac. 892;

Ex parte Turman, 84 Am. Dec. quoting from the syllabus:

"Constitutional provision guaranteeing to every citizen speedy and public trial in all criminal accusations, is intended to prevent the government from oppressing its citizens, by holding criminal prosecutions suspended over them, and to prevent delay in the administration of justice by obliging the courts

to proceed with dispatch in the trial of criminal charges.”

In the case of *In re Begerow*, 133 Cal. 249, 65 Pac. 828, 85 Am. State Rep. 178 it is expressly held that this statute is mandatory. In the exhaustive note to this case, reported in the 85 Am. State Reports, *supra*, the question of a speedy trial is canvassed where it is said: “A speedy trial does not mean a trial actually upon the presentation of the indictment or the arrest upon it.”

“It simply means that the trial shall take place as soon as possible after the indictment is found, without depriving the prosecution of a reasonable time for preparation; *ex parte Stanley* 4 New York, 113. It is a trial at such a time after the finding of the indictment, regard being had to the terms of court, as shall afford the prosecution a reasonable opportunity, by a fair and honest exercise of reasonable diligence to prepare for trial; and if the trial is delayed or postponed beyond such period, when there is a term of court at which a trial might be had, by reason of the neglect or laches of the prosecution in preparing for trial, such delay is a denial of the defendant’s right to a speedy trial. *United States vs. Fox*, 3 Mont. 512, 517, per Wade Chief Justice. A speedy trial is one conducted according to fixed rules, regulations, and proceedings of law, free from vexatious, capricious and oppressive delays created by the ministers of justice: *Nixon vs. State*, 2 Seedes & M. 497, 41 Am.

Dec. 601.”

State vs. Mollineaux, 149 Mo. 646; 51 S.
W. 462.

REMEDIES OF DEFENDANT WHEN DENIED A SPEEDY TRIAL.

A defendant who has been denied a speedy trial has a right to move the dismissal of the prosecution on that ground.

People vs. Camilo, 69 Cal. 540; 11 Pac. 128;
State vs. Hansen, 10 Wash. 235; 38 Pac.
1023;

People vs. Morino, 85 Cal. 515, 24 Pac. 892.

When the trial is so long delayed, witnesses become scattered and the facts of the case, such is the frailty of human memory, become less certain and witnesses are not as well prepared to testify to what the facts actually are.

Moreover, there must come a time sometime after the defendant has been indicted, or after he has been convicted and a new trial granted, as in the case at bar, when to try him again on the same indictment would be a denial of his constitutional rights. Such we claim is the case at bar. Term after term of court with a jury has been held since the motion for a new trial was granted, and a period of something over three years has elapsed since the filing of the indictment in this case.

Rec. 9.

Was the plaintiff in error in this case granted a speedy trial in being compelled to go to trial some

three years after the alleged crime was committed? The papers filed in support of the motion to dismiss, and which are not even attempted to be contradicted in any way, show that the indictment herein was filed December 21, 1910; the case was first tried in June, 1911, and a new trial was granted on the 14th day of October, 1911, and that this case was not again tried until March, 1913.

Rec. 19-31.

True it is that cases may be found holding that it is incumbent upon the defendant to formally demand a speedy trial. The record does not disclose that he did. Thinking that the prosecution had been abandoned and that, ultimately, the case would be dismissed, defendant took no action. But suppose he had waited five or ten years, could he then have been constitutionally tried? In other words, is there no limit of time, under the Constitution, and even when a defendant makes no formal demand for a trial, in which he can be legally tried? It would seem that there is and that the limit had been reached in the case at bar when appellant was last tried, and that his motion to dismiss the case should have been granted.

ADMISSIBILITY OF EVIDENCE.

Over objection, the Court admitted a large amount of testimony, which it is claimed is evidence of the commission of similar offenses. The theory upon which this was admitted, as stated by the

Court, in its instructions, record 146-147, was to show intent or scienter.

This testimony related to other animals which the defendants had in their possession at the time of the general roundup of their stock, and which bore some other brand beside their own. Concerning all of such animals, there is no evidence in this record, that plaintiff in error stole, or bought or received them, knowing them to be stolen. Among such number was the CZ animals of Flat Tail, top of page 39 of the record; a JT cow, record 39; a Lazy P diamond steer, record 39; the T anchor P steer, record 40; an HM cow, record 40. As to this last named animal the count in the indictment, in which it was found had been dismissed at the time of the last trial, yet the Court permitted evidence of it to go in.

Rec. 40-41.

Other animals of this character were a P Lazy S; an ER steer; E2 steer, record 41; and a DC animal. When these animals were bought or when they were stolen, if stolen at all, or when they were received, the record is silent. Speaking of this character of evidence, in Vol. 2 of Wharton's Crim. Law, 11th Ed., page 1499, it is said:

“And where there is a marked difference in the time and character in the receptions, one cannot be received to prove the other.”

As we understand the rule, to make evidence of similar acts competent, it must relate to prior acts,

not subsequent ones. The District Attorney failed to prove when the alleged similar acts were committed, whether before or after, or at the time the offenses alleged in the indictment, are alleged to have been committed. We understand Mr. Wigmore lays down the same rule, 1 Wigmore on Evidence, Secs. 301, 302 and 304. In section 302 this author says:

“And the *prior* doing of other similar acts, whether clearly a part of the scheme or not, is useful, as reducing the possibility that the act in question was done with innocent intent.”

Prettyman v. U. S. 180 Fed. 30; 103 C. C. A. 384; U. S. v. Brenner 139 U. S. 288.

When this testimony was first offered, under the promise of the District Attorney to connect it up with the defendants, the Court admitted it over objection, but the District Attorney failed to connect it up. Manifestly, all this class of testimony was greatly prejudicial to the plaintiff in error. The defendants never denied buying, receiving and branding the animals, but they have always denied that any of them were purchased with knowledge that they had been stolen. This was the only point in the whole case.

WITHDRAWING TESTIMONY FROM THE JURY.

The Court, evidently appreciating the fact that the District Attorney had failed to connect this class of evidence up as he had promised, undertook in its instructions, to withdraw a portion of the same from the consideration of the jury. The Court instructed the jury upon this point as follows:

“In respect to this indictment, first, the Court will withdraw all the animals described in the fourth count, except the first one that Charles and Mitchell admitted was stolen and received and branded by them, for the reason they are in a measure duplicates; for instance, the first animal they admit having received and branded was also charged to be a cow, the District Attorney apparently not being sure of the sex of the animal; and with reference to the Cobelle steer there is no sufficient proof that this particular animal charged in the indictment—there was testimony of a Cobelle steer, but not that it was a steer branded NC as charged in the indictment; so the court will say to you that the only animal upon which you are to pass upon the guilt or innocence of the defendants in the fourth count is the first one described herein. There is some *other* evidence, upon review of it at the noon hour, the Court has concluded to withdraw from you, and that is all evidence that the cow branded JT of Joe Tatsy, the steer P Diamond of Old Rock, the cow

HM of Henry Marceau, the steer ER of Eagle, the cow MF of Frank Monroe, the steer E2 of Young Running Crane, the cow DC of Double Cloth; the testimony in reference to these is all withdrawn from your consideration, and you will disregard it, and for this reason; it was proper enough as it was introduced, because the expectation was that the evidence would go further and show that it came into the hands of these defendants from someone who had stolen it. The evidence was conclusive enough that the property was stolen, but there was no evidence how it got into these defendants hands. Now if these defendants were on trial for stealing stock, the evidence that they had in their possession other stolen stock might be permitted to raise an inference that they had stolen it; but they are not here charged with stealing stock, but with receiving stolen property, and before the evidence of other stolen stock in their possession can be received and considered by you, from which to draw inference of their knowledge, there must be some proof that it was stolen by someone else other than the defendants; but there is no evidence of that kind here.”

We think there can be little question that the admission of such testimony was error and the only question that now remains concerning it, is whether or not its withdrawal by the Court from the consideration of the jury, cured the error.

The rule seems to be well settled in the federal courts, at least as to when incompetent evidence can

be withdrawn and the error cured by its withdrawal and likewise when the reception of such incompetent evidence can be rendered harmless when it is withdrawn from the consideration of the jury. It depends upon the character of it, whether or not the incompetent evidence submitted was of such a character that its reception would likely prejudice the minds of the jury against the defendant, notwithstanding its withdrawal by the Court. If the evidence is of such character, then the error of its admission is not cured by its withdrawal. We submit that it cannot be successfully controverted, that the reception of this evidence unquestionably greatly prejudiced the defendant, and that its withdrawal by the Court from the consideration of the jury, could not in the very nature of things remove the impression from their minds, which its reception occasioned.

The Supreme Court of the United States, in the case of *Throckmorton v. Holt*, 180 U. S. 567, says:

“The general rule is that if evidence which may have been taken in the course of a trial, be withdrawn from the consideration of the jury, by the direction of the presiding judge, that such direction cures any error which may have been committed by its introduction. * * * But yet there may be instances where such a strong impression has been made upon the minds of the jury by illegal and improper testimony, that its subsequent withdrawal will not remove the effect caused by its admission,

"State vs. Rees, 40 Mont. 579;
Drury v. Ter. 60 Pac. 101;
People vs. Rodrrrodigues, 134 Cal. 140;
66 Pac. 174."
State vs. Rees, 40 Mont. 579;
107 Pac. 893.

and in that case the general objection may avail on appeal or writ of error. This was stated by Mr. Justice Field in *Hopt v. Utah*, 120 U. S. 430, 30 L. ed. 708, 7 Sup. Ct. Rep. 614. *Waldron v. Waldron*, 156 U. S. 361, 383, 39 L. ed. 453, 459, 15 Sup. Ct. Rep. 383.”

Hopt v. Utah, 120 U. S. 430;

Waldron v. Waldron, 156 U. S. 38.

BOSTWICK WAS AN ACCOMPLICE.

If the plaintiff in error were guilty, Bostwick was an accomplice. Speaking of accomplices, it is said:

“His testimony, however, like that of all other accomplices, is to be scrupulously weighed and upon it, if uncorroborated, a conviction should not be permitted to arise. A bare possession of the stolen property is not a sufficient corroboration.”

Wharton’s *Crim. L.* 11th ed. page 1446.

The defendants requested the Court to charge the jury as to the law of an accomplice, record 140, requested instruction No. vii. This the Court refused to do and error was assigned in consequence thereof. The Court did, however, tell the jury, record 165, that:

“If the defendants knew he was selling them stolen stock, then he would be an accomplice of theirs. That would lead you, of course, to give Bostwick’s testimony serious consideration; scan it very carefully. You should do that anyhow because

he has been convicted of stealing this stock, and you take that into consideration in weighing his evidence.”

But the Court, nowhere in the instructions, tells the jury that the evidence of an accomplice must be corroborated, or that if they found Bostwick was an accomplice, that it was necessary that his testimony should be corroborated before a conviction could be had.

In the court below, it was contended that the testimony of an accomplice did not have to be corroborated in the federal court, and that the rule of state courts in this respect did not apply. The trial judge seems to have taken this view of the law. The rule, however, is the same in the federal courts as in the state courts.

“No conviction should be had on the uncorroborated testimony of an accomplice.” 1 Ency. of U. S. Sup. Ct. Rep., title “Accomplices.”

It is the duty of the Court to instruct the jury, and especially when requested, that the uncorroborated testimony of an accomplice is insufficient to convict. *Grim v. United States*, 156 U. S. 604; *Reagan v. United States*, 157 U. S. 301.

“*Reg vs. Fraler*, 34 Eng. C. L. 314.”

INSTRUCTIONS OF THE COURT.

GUILTY KNOWLEDGE.

Sec. 288, of the Criminal Code of the United States, in force January 1, 1910, is the statute under which plaintiff in error was prosecuted. It reads:

“Whoever shall buy, receive, or conceal, any money, goods, bank notes, or other thing which may be the subject of larceny, which has been feloniously taken, stolen, or embezzled, from any other person, *knowing* the same to have been so taken, stolen, or embezzled, shall be fined not more than one thousand dollars and imprisoned not more than three years; and such person may be tried either before or after the conviction of the principal offender.”

The charge in the indictment is that defendant did “feloniously buy and receive,” the cattle “knowing the same to have been so feloniously stolen, taken and carried away.” It is thus observed that the indictment does not charge concealment of the property in question but only charges the felonious buying and receiving.

The Court instructed the jury at great length as to what constitutes guilty knowledge under Sec. 288, *supra*. For example, at the bottom of page 150 of the record, the jury are told:

“You will observe that the law involved requires that before a party can be convicted of buying or receiving stolen property, he must have knowledge

that the property he is buying or receiving, was stolen. Now the fact that he has this knowledge need not be shown by direct thestimony, *nor is it essential* that the accused have *actual or positive knowledge* such as one acquires by personal observation of the fact; that is to say, it is not necesssary that he who buys should see the thief taking the property, nor is it necessary that the thief should tell him he stole the property, but if the circumstances and conditions surrounding the purchase, and the nature of the property and all are such that it can be inferred by you, *as reaosnable men, that the defendant had knowledge, you have a right to draw that inference. You may infer such knowledge from circumstances that should suffice to satisfy a man of ordinary intelligence and caution that the property was stolen.*”

Rec. bottom page 150 and top 151

And again, following this on the same page, 151, the jury are told, in effect, that actual knowledge of the larceny is not necessary but “that whatever would carry knowledge or induce a belief in the mind of a defendant that the property was stolen, *that would induce it in the mind of a reasonable person under the same circumstances, it would, in the absence of countervailing evidence, be considered by you sufficient to apprise the defendant, or induce in his mind a like belief.*”

Rec. 151.

Likewise again at the top of page 152 of the

record, the same doctrine as to the character of knowledge that the statute requires is again stated by the Court, wherein the jury are told that “If the *facts and circumstances* surrounding the defendants’ receipt of the property were such as would reasonably satisfy a man of their age and intelligence that the goods were stolen, or if they failed to follow up an enquiry or suspicion so suggested for fear he or they would learn the truth and find the goods were stolen, then he or they are held as strictly responsible for receiving stolen goods as though he or they had actual knowledge.”

And following this instruction, the jury are told, in effect, that suspicion or suspecting the property was stolen, “and he makes no enquiry or no investigation, because he fears he would find out the truth,” then that he is as guilty as if he had actually discovered and learned that the property had been stolen.” In this instruction, the jury are told, “*he is charged with what he knows or what he is put upon enquiry to know.*”

Following this, and on the same page, the Court continues with the elucidation of this doctrine, which we insist is wholly erroneous, and the jury are again told that circumstances, sufficient to put defendants on inquiry, must be considered, and if these circumstances exist and the defendant did make the inquiry, he is held to have possessed that knowledge required by the statute for the enquiry, had it been made, would have resulted in his learning that the

cattle had been stolen.

Throughout the lengthy instructions of the Court to the jury on this question of guilty knowledge, the Court was extremely careful to constantly keep before the jury his interpretation of this statute as to what was meant by having knowledge of the fact that the property had been stolen. This is shown in the instructions found at the bottom of page 153 and the top of page 154 of the record, wherein the jury are told, "knew the property was stolen, knew, as I have heretofore indicated to you, *not necessarily the actual knowledge*, but such knowledge as would put a reasonable man upon enquiry from which he could ascertain the truth."

And again on page 154, in telling the jury what it was necessary for the prosecution to show before a conviction would be had, the jury are told:

"Third, that one or more received and retained the property described, of the property of the indictment with *knowledge, belief or reasonable suspicion, that he failed to investigate for fear he would learn the truth that the same had been stolen.*"

The twenty-sixth specification of error, brief page 13, requested the Court to charge as follows:

"The Court instructs the jury that before you can convict any of the defendant, you must first be satisfied beyond a reasonable doubt of the truth of three propositions, viz:

First. That the property described in the in-

dictment or some of it, was stolen in the manner and form as charged in the indictment.

Second. That one or more of the defendants received or retained it in his or their possession, with intent to convert it to his or their own use or gain.

Third. That one or more of the defendants received or retained the property described in the indictment, or some of it, with knowledge that the same had been stolen.”

The Court refused to give this instruction as requested, which, we insist, is clearly the law, but modified the same by inserting after the word “knowledge” in the third line of the third subdivision of said requested instruction, the following, “belief or reasonable suspicion which he failed to investigate for fear he would learn the truth.”

Following this instruction, record bottom page 154 and top of page 155, the jury are again told that, if at the time when the defendants purchased and received the cattle, if they “believed or reasonably suspected, as aforesaid, that the same had been stolen or any of them; in order for the conviction of any one of the defendants it is necessary for the prosecution to satisfy your minds beyond a reasonable doubt that the defendants knew, believed, or reasonably suspected, as aforesaid, that the cattle had been stolen at the very time they purchased them.”

Here, if your Honors please, is a positive and

emphatic instruction to the jury, that suspicion that the cattle had been stolen, is all that is necessary to a conviction, and that too, in the face of a statute which contains no such language or anything like it, but, on the contrary, contains the plain, clear, emphatic and unambiguous term “knowing.”

The Court in this instruction, which was objected to, like all the rest similar to it, gives to this statute a meaning it will not bear by any rules of statutory or grammatical construction, we have been able to discover. If Congress, in the enactment of this statute, had intended that suspicion or even “reasonable suspicion,” as the Court says, whatever that maybe, should be the law of the land upon this subject, of course it would have so declared. The lower court gave a meaning to this statute wholly unwarranted by any language found in it. “To know,” is to perceive or apprehend, clearly or certainly; to understand; to have fully information of, or to be convinced of the truth of a thing. (Webster’s International Dictionary). The Century Dictionary defines “knowing” as follows: to have a clear and certain perception or apprehension of, as a truth or fact. How it was possible for the Court to confound suspicion with knowledge in such a statute as this, I confess I am unable to discover.

Again, the same error is repeated once more near the top of page 156 of the record, where the same identical language is used, and the jury are

told that if the defendants, “purchased the property in good faith, without knowledge or belief, or reasonable suspicion which they failed to investigate for fear of discovering the truth,” that was sufficient.

And further on in the same paragraph, in the same instruction, we have the language “reasonably suspecting, as before stated.”

We submit that all the foregoing instructions were in the very teeth of the statute and were most highly prejudicial to the defendant. Exceptions are reserved to such instructions.

In considering this assignment of error, and the decisions which will be canvassed in relation thereto, all the facts and circumstances surrounding and accompanying the buying, branding and receiving of the animals in question must be duly considered, for the reason that they, themselves, become potent evidence upon the sole and vital question in the case at bar, viz., that of scienter. In cases where a conviction has been upheld for buying and receiving stolen property knowing it to have been stolen, one or more of the following evidential circumstances were proven:

1. A grossly inadequate price paid for the stolen property.
2. Secrecy in its purchase and concealing the property.
3. Denial of its purchase.
4. Attempting to dispose of the property after

its purchase and particularly for an inadequate price.

5. Bad reputation of the seller, and particularly with reference to his having previously disposed of stolen property and that the defendant had knowledge of the same.

All these are elements or circumstances, and perhaps there are others, which accompany and attend the buying and receiving of stolen property knowing it to have been stolen, and when one or more of these circumstances are proven on the trial it becomes competent evidence tending to show guilty knowledge. Not that it may be always sufficient to convict, but it is, to a greater or less degree, at least incriminatory. In the case at bar, if the Court please, not a single one of these elements or circumstances is present. Not one of them was proven or even attempted to be proven on the trial. On the contrary, all the evidence shows that a full and fair price was paid for every head of cattle that the defendants purchased from Bostwick. Even Bostwick himself, the star witness for the prosecution, emphatically so testifies. The Court, in the instructions, very fairly told the jury that the court thought it must be held, under the evidence, that a fair price was paid, which was thirty dollars a head, Rec. 157 and bottom of 159. If, indeed, this were not a fair price, then the Indian Agent, Joe Brown, the Stock Inspector, Buck and many others, who testified and were familiar with the animals,

and their value would, undoubtedly, have contradicted the testimony of Bostwick. The evidence is, therefore, conclusive that a fair price was paid. As to their manner of purchase, all the evidence on the part of the Government shows that every head of these cattle was purchased and branded in broad daylight and treated and handled precisely as defendants' own stock and precisely the same as stock which they bought and which was straight. The Government's own witnesses, Rec. 59, testified that there was nothing to arouse suspicion concerning the branding of these cattle. Nor was there any pretense that there was any concealment about the purchase at all, nor any denial of the transaction. The defendants always admitted the purchase and the branding and reception of the cattle. Neither did they attempt to sell them at any price or to do a single act in relation to them different from their own cattle which had, confessedly, been legitimately purchased. Again, the reputation of Bostwick prior to these transactions, so far as known by the plaintiff in error, was good. He had been in the cattle business, buying and selling cattle, and, as he himself tells us, had never had any trouble before, Rec. 103. He had money in the First National Bank at Kalispell on which he checked in payment of stock, and that so far as any prior conduct upon the part of Bostwick is concerned, at least so far as this record discloses, his reputation was just as good as that of any other man on the Reservation or

anywhere else. We submit to the Court, in considering the instructions so far as they relate to the question of knowledge upon the part of this defendant, we should bear in mind the evidence upon these points. Moreover, this plaintiff in error is an Indian, a ward of the Government of the United States, a young man, who, presumably, has spent all his life among the Indians and on an Indian Reservation. It is common knowledge that the mode and habits of life of these Indians, and of their intercourse and dealings with each other, ought not to be gauged the same way as that of a white man living in a civilized state. The plaintiff in error was dealing with the Indian Bostwick, whom he had known for a long time and who was friendly with the defendant and his family.

Having now referred to the facts and circumstances which attend and accompany cases of this kind, where a conviction is upheld, we now invite the attention of your Honors to the decisions.

In the case of the State vs. Rountree, reported in 61 S. E. 1072, and also in 22 L. R. A. N. S. 833, it is said:

“We proceed to consider the question presented by the following exception: ‘that his Honor erred in charging the jury that guilty knowledge may be constructive, ‘as when the circumstances are such as would put a person upon such inquiry, as, by a reasonable pursuit of that inquiry, the actual facts would have been discovered. Because the law

requires a man, when put upon notice of facts so that, by pursuit of the inquiry with reasonable diligence such as a man with reasonable diligence would carry on, he would ascertain the facts, the law affixes the true facts upon him, because it requires him to pursue his notice with that degree of diligence which a man of ordinary prudence would pursue, and, if you are satisfied from the testimony that a man of reasonable prudence should have pursued the inquiry, and would have pursued the inquiry, and by that pursuit would have discovered the true facts, then the law affixes that knowledge upon him, as well as if he had actual knowledge.' Whereas, there was no evidence of notice upon which the defendants were put on inquiry, and this was an enlargement of a statute which holds a party guilty who buys stolen goods knowing them to be stolen at the time, and not what defendants might have ascertained by inquiry thereafter, or before said purchase. And his Honor's charge was of an equitable principle, which could not be made effective in assisting the enforcement of a criminal suit."

The court then proceeds to quote the criminal law as to receiving stolen property, which is in substance the same as that under which the plaintiff in error was convicted, and then proceeds:

"There is no doubt as to the well settled rule in civil actions that knowledge of such facts as are sufficient to put a reasonably prudent man on inquiry is equivalent to notice, but such is not the rule in

cases arising under the foregoing section of the Criminal Code. As stated by the Court in the case of *State v. Crawford*, 39 S. C. 343, 17 S. E. 799:

‘It is necessary that the guilty knowledge should be alleged, as well as the fraudulent intent.’ It cannot be successfully contended that a mere inadvertent failure to pursue an inquiry with reasonable diligence is the equivalent of guilty knowledge and a fraudulent intent, which are essential elements of the crime, as otherwise a person could be punished under the statute for negligence unaccompanied with intentional wrong. Knowledge of the theft on the part of the receiver is an essential element of the offense, and such knowledge must exist at the moment the property is received.”

For the error in this instruction the judgment of the trial court was reversed and the case remanded for a new trial.

In the case of *State vs. Denny*, 117 N. W. 869, the following instruction was held erroneous:

“Guilty knowledge is made out, and sufficiently proven to warrant a conviction in that respect, by the proof that the defendant received the property under such circumstances as would satisfy a man of ordinary intelligence and caution that they were stolen.”

The court held that the standard by which guilty knowledge may be imputed should not be that of a man of ordinary caution and intelligence but an individual test of the defendant.

In *Pickering vs. United States*, 101 Pac. 123, an instruction to the jury to find for the State if the defendant received the property with knowledge that it had been stolen, or under such facts or circumstances as would cause a reasonably prudent man to believe it had been stolen,—that is to say, under such circumstances as would put a reasonably prudent man upon inquiry before taking the property, was held error.

So likewise the following instruction was held erroneous in the case of *State vs. Daniels*, 61 S. E. 1073.

“Where a person has knowledge of facts, or has *suspensions* that would induce a person of ordinary prudence to make an inquiry, then he is required to do so. If he fails to do so, he is as much bound by what may be the state of facts as if he had been informed as to what they were. If the defendant had notice of facts that would put him on inquiry he is bound to pursue those facts, and, if he fails to do so, it is at his own risk.” That is just what the jury were told in this case. See also *Miner vs. State*, 45 So. 318.

Sanford vs. State, 61 S. E. 741.

In the case of *State vs. Goldman*, 65 N. J. L. 394, 47 Atl. 641, the judgment of conviction was reversed where the jury was instructed as follows:

“That which a man ought to have suspected, in the position of the defendant, he should have suspected, and he must be regarded as having

suspected, in order to put himself upon his guard and upon inquiry.”

Of course the mere possession of stolen goods without proof that the accused received them with guilty knowledge, arouses no presumption against the defendant, and is insufficient to establish guilty knowledge.

Territory vs. Claypool, 71 Pac. 463.

Toliver vs. State, 8 S. W. 806.

Before a conviction can be upheld under indictment for receiving stolen property knowing it to have been stolen, knowledge of that fact must be established beyond a reasonable doubt.

Stripland vs. State, 40 S. E. 993.

May vs. People, 60 Ills. 119.

Gordon vs. Minn., 117 N. W. 483.

State vs. Daniels, 61 S. E. 1073.

In the case of Kirby vs. United States, 174 U. S. 47, the lower court instructed the jury as follows:

“Now, upon the question of whether the defendant knew that it was stolen property, you will, of course consider all the evidence in the case. You have a right to find that the person or the defendant knew that it was stolen property from the admissions he may have made, if he made any, if there is such evidence in the case, or from other circumstances that you would have a right to infer that he did know. Now, if a person received property under such circumstances that would satisfy a man of

ordinary intelligence that it was stolen property, and you further find beyond a reasonable doubt that he actually did believe it was stolen property, then you have a right to infer and find that at the time of the receipt of the property the person knew that it was stolen.

The judgment in this case was reversed.

“We said in *May vs. People*, 60 Ill. 119; ‘In order to a conviction it was necessary for the prosecution to satisfy the jury, beyond a reasonable doubt, that the accused knew the goods had been stolen at the time he received them’ and in *Aldrich vs. People*, 101 Ill. 16 ‘guilty knowledge on the part of the defendant is essential to the constitution of the offense.’

“It is true that proof of direct knowledge is not necessary, and that evidence of facts and circumstances sufficient to create in the mind of the accused a belief that the goods were stolen, may amount to guilty knowledge of the fact (*Huggins vs. People*, 135 Ill. 245, 25 N. E. 1002, 25 Am. St. 357) but this instruction goes further, and tells the jury, first, that knowledge is not necessary, nor even belief, on the part of the defendants, if the evidence be sufficient to induce a person of ordinary observation of belief.”

Cohn vs. People, 197 Ill. 482; 64 N. E. 306.

The instruction in that case, and which the Supreme Court of Illinois held to be erroneous and

reversed the case, is as follows:

“It is not necessary to the conviction of defendant or defendants that the people should show that the defendant or defendants saw the goods stolen, or was told that they had been stolen, *or had absolute knowledge* that they were stolen goods. If it appears by the evidence that circumstances presented and manifest to the defendant or defendants at the time of the reception of the goods in question (if you believe from the evidence that the defendants received the same) were such as to have induced them and any man of ordinary observation *to believe* that the property was stolen and was being offered for sale to the defendant or defendants by one who had no right so to do, that is sufficient.”

We confidently submit that, under the foregoing authorities the defendant is entitled to a new trial under the instructions of the court.

Justice Harlan, speaking for the Supreme Court of the United States, says:

“It was incumbent upon the Government, in order to sustain its charge against Kirby, to establish beyond a reasonable doubt, (1) that the property described in the indictment was in fact stolen from the United States; (2) that the defendant received or retained it in his possession with intent to convert it to his own use or gain; (3) that he received or retained it with *knowledge* that it had been stolen from the United States.”

Kirby vs. U. S., 174 U. S. 53.

What makes these instructions all the more objectionable and harmful is the fact that not a single element or circumstance which attends and accompanies the buying and receiving of stolen property, knowing it to be stolen, was present or attended the buying and receiving of these animals from Bostwick. The record shows that Bostwick had never been in trouble before and that his reputation as an honest and trustworthy stock buyer and seller was good and that none of the Petersons had the least occasion to suspect his honesty in the transaction. These features of the case will be more fully considered when we come to consider the question of the insufficiency of the evidence. We now simply call the Court's attention to them in order to emphasize the error of the instructions complained of. Of course, had defendants denied the buying and receiving of the cattle, had they purchased at a grossly inadequate price and received them secretly, or had concealed or attempted to conceal their possession of them, or had done a single thing or failed to do a single thing which characterizes the conduct of the criminal in such cases, then it might become a debatable question as to how far a court might, with propriety, go in instructing a jury as to what extent such circumstances prove guilty knowledge on the part of the receiver of stolen property. We respectfully insist that all of these instructions, as to guilty knowledge, based upon the record in this

case, are wholly and entirely erroneous, and that the giving of them constitutes reversible error.

No such instructions as these, or any like them, have ever been approved or upheld in any appellate court so far as we are able to discover. On the contrary, the giving of them, as shown, constitutes reversible error in every case.

Again, knowledge that the property was stolen must be proven beyond a reasonable doubt.

See exhaustive note to *State vs. Rountree*,
supra, 22 L. R. A. N. S. 833-841.

See also *Coffin vs. U. S.*, 156 U. S. 432;

Rosen vs. U. S., 161 U. S. 29;

Roscoe's Criminal Evidence, 6th Ed. 178-420.

Upon this branch of the case, we take it, there can be little question that the court erred in giving these instructions and a new trial should be granted on this ground.

REMARKS OF THE COURT.

The record of this assignment is contained in defendant's bill of exceptions No. 2, Rec. 174-177. This bill shows that the jury could not agree after they had remained out all night; that on the following day they returned into court and reported that they were unable to agree except as to the defendant, Walter Peterson. Whereupon the court declined to receive a verdict as to one defendant and then proceeded, of its own motion, to give the jury further instructions in which this matter excepted

to occurs. We understand the rule to be that a Federal Judge may comment upon the evidence, which a judge may not do in a state court, providing the jury are instructed, at the time, that they are not bound by the opinion of the court as to what the facts are. But that the instructions and comments of the Court must be confined to the evidence in the case, and that to instruct a jury, as to matters not in evidence, such as the expenses of a former trial, the expenses of the present trial, or what the probable expense would be in the future, in case of a disagreement, are matters outside of the power of the Court. In this case, as the bill shows, and as the fact is, within less than an hour after the Court had remarked to the jury upon the very heavy cost of this prosecution, and that both parties had a right to have it determined for the purpose of saving expense, and that there was no more probability that a jury in the future would be more likely to agree than this one, the jury returned a verdict of guilty against the plaintiff in error in less than one hour, Rec. 176-177. We submit, that under this record, that the above remarks of the Court manifestly induced a verdict of guilty against the plaintiff in error and that but for such remarks, he would never have been convicted.

The solemn oath a juror takes when sworn to try a case according to the law and the testimony does not permit him, even to consider for a moment the cost of the litigation. Indeed, it would be

a violation of his oath did a juror allow such considerations to influence his verdict. For the length of the trial, the cost thereof and all kindred matters, the jury are not responsible. They, as said, can properly consider, in making up their verdict, only the testimony in the case and the instructions of the Court. Now, those remarks of the Court, as to the enormous cost to the parties of this litigation, *was not an instruction as to the law of the case*, and, hence, like an expression of opinion by the Court as to the guilt or innocence of a defendant, was not binding on the jury. Moreover, such remarks, we respectfully insist, strongly tend to influence jurors to disregard their oath and to, *in fact*, consider foreign and extraneous matters, in making up their verdict, the very thing the jury has sworn it would not do. How greatly defendant was prejudiced by such remarks, the record clearly, if not indeed, conclusively, shows. At any rate it is indisputable that no Court can say, under this record, that these objectional remarks of the Court did not cause the conviction of plaintiff in error, and that had they never been made that he would not have been convicted. The inevitable, logical result of such a practice as permitting nisi prius judges to instruct juries or remark to them, when a disagreement is reported, upon the great cost of the case, etc., is to substitute cost of litigation for testimony in determining the life or liberty of a person accused of crime. Such practice, we insist, is not

due process of law. It is a violation of every safeguard the Constitution has placed around a defendant accused of crime. It is not only mischievous and dangerous, but it is subversive, even, of the right of trial by jury. It should not receive the approval of the courts. Such a practice is fraught with too many and too great dangers to be upheld.

INSUFFICIENCY OF THE EVIDENCE.

In what has already been said, much has appeared showing wherein the evidence is insufficient to justify a conviction in this case. It has been shown that the suspicious or incriminatory circumstances which accompany and attend the buying and receiving of stolen property, knowing it to have been stolen, are utterly wanting. We briefly recapitulate the testimony, such as it is, that can, in any manner, be construed as having any bearing upon the case.

Joe Brown, the Indian Stock Inspector, testified that in October, 1910, the Indian Agent McFatridge, instructed him to take some men and gather up all the Peterson cattle, bearing their brand and which also had another brand.

Rec. 30 and 45

They gathered up some 67 head of such cattle and brought them to the corral at Browning. Among the number were found the 4 head described in Count I of the indictment, which was the only count upon which defendant was convicted.

Rec. 37-39.

The cattle had the brand of defendant on them, Lazy U Lazy J, on the right ribs.

Rec. 39.

The men did not bring in all the cattle bearing another brand beside the Peterson brand. The inspector says that he found 20 or more of such cattle which he was satisfied were all right.

Rec. 45.

The inspector further testifies that he knew the Petersons were buying and selling cattle and that it was nothing strange to find their cattle with other brands on them beside their own.

Rec. 46.

Ten of the 67 head, which were brought into the corral, were at once turned out on the range as it was discovered they were all right.

Rec. 46.

The Indians, also, who had sold cattle to the Petersons, came to the corral and said that they had sold them and had received their money for them and that everything was all right.

Rec. 47.

In addition to this, a lot more of the cattle which were brought in, were found to be all right as the record shows that the agent, who sold all of the cattle, turned back to the Petersons \$250.00, or more in money that he had received for the sale of Peterson cattle.

Rec. 47.

Arthur E. McFatrige, the Indian Agent, identified Gov. Ex. "A," purporting to be an affidavit of the plaintiff in error and his two brothers, Oscar and Walter, which affidavit states that "the list named herein are all the cattle purchased by us from the said John Bostwick." The affidavit contains a list of cattle with other brands. The witness was unable to state which one of the affiants read the affidavit, or whether or not Mitchell Peterson read it at all. He does state, "there were no cattle in this bunch bearing the brand of Oscar Peterson. I don't know if Oscar Peterson ever bought a single head of cattle in his life."

Rec. 50, 51, 52-53.

Yet Oscar signed the affidavit as well as Mitchell and Walter. There had been talk of the prosecuting of Bostwick before the affidavit was signed.

Rec. 51.

The agent further tells us that he "knew Peterson was quite a stockman," and "I knew at the time that he had bought cattle of Indians," and that "it is the custom among Indians, in common with that of stockmen, when buying from the Indians, to vent the brand and put their own brand on."

Rec. 54.

He further testifies, "out of this bunch that was brought in, some Indians came down there and stated that they had sold such animals to the Peter-

sons," and that he sold a number of head of these cattle and paid the money received for them to the Petersons.

Rec. 55-56.

Levi Burd, another witness for the Government, testifies that about October 21, 1910, he was at the Peterson Ranch when they were branding, but he saw nothing suspicious as everything was being done in the usual manner and "was out in broad daylight."

Rec. 57-59.

Old Rock merely identified his brand, which was not found on any of the animals described in the indictment.

Rec. 62-63.

Of what possible evidentiary value is the testimony of Old Rock, and a host of kindred witnesses, we are unable to see.

Dave Pambrum testified to his owning the T anchor P brand and which is not one of the brands described in the indictment. He went to the agency about the first of November, 1910, and saw some of his cattle there in the Government corral. Among the number was a yearling steer with his brand on it together with another brand, and that he had never given permission to anyone to put the other brand on the animal or to drive it from the range; when the animal first got away, he didn't pay any attention to it. This was about August, 1910.

Rec. 65-67.

Henry Marceau gives us similar testimony. His brand is HM, not one of the brands described in the indictment. There is this difference in the testimony of Marceau:

Q. "Did you ever tell anyone that they could drive this cow off from your place on the range where it was running?

A. Yes, sir.

Q. Who did you tell he could drive it away?

A. I spoke to a fellow about the cow and he told me he drove the cow away from the range and I asked him why he drove the cow away."

Rec. 69.

He further says that all he knows about the case is that he went down to the Agency, having missed this HM animal, and found it there and got the money for it and that he didn't lose anything.

Rec. 70.

Of like character is the testimony of Brocky and Eagle, record 70. Neither of their brands are found in the indictment in this case.

Young Running Crane identified his brand as an E2 on the right shoulder, not one of the brands described in the indictment. This brand nor none of these others were on any of the cattle described in the indictment in this case.

Rec. 71-72.

Of like character is the testimony of Double Cloth, record 72, and also that of Dick Kipp, record 73-74, as likewise the testimony of Louis Monroe,

record 74-75, and Frank Monroe, record 75-76. None of the brands of these witnesses appear upon the animals described in the indictment.

Joe Tatsey likewise gives similar testimony. His brand is JT on the left shoulder, not one of the brands described in the indictment.

Rec. 77.

Of the same character and tenor is the testimony of Phillip Flat Tail.

Rec. 78-79.

This count was dismissed at the former trial, but the court allowed everything to go in, regardless of whether the count had been dismissed or not.

None of these witnesses, in any manner or form, even remotely, tend to prove the charge that the plaintiff in error brought and received any one of the four animals described in the first Count of the indictment, knowing them to be stolen. Evidently they were put upon the stand for the purpose of prejudicing the plaintiff in error and of influencing the jury.

Albert Goss, was one of the men who assisted Joe Brown, the Stock Inspector, in rounding up the cattle.

Rec. 79.

On the bottom of page 81 of the record, the witness testifies regarding the time when he came to the Peterson ranch as follows:

“I rode down there in the day time and found Melvin Peterson and the other Peterson boys there,

all three, Mitchell and Walter, they were working cattle out in the field, some of the very cattle I took over. It was broad daylight and the field was in plain sight of the road, anybody could see it. I don't know that they were trying to hide anything in that field."

Rec. 81.

Matt Lytle was likewise one of the men who helped to corral the cattle and he gives us substanti-ally the same testimony as Albert Goss.

Rec. 82-86.

JOHN BOSTWICK.

This witness was the star witness for the prosecution, a self-confessed thief, who, at the first trial, came from the county jail where he was serving time, to testify for the Government. Without his testimony, the Government would have no standing whatever in Court, and with it, we respectfully insist, since he is an accomplice of the plaintiff in error, if the theory of the Government is correct, that they still have no standing in Court, for the reason that his testimony is not corroborated.

Bostwick testifies that he worked for the Petersons during September and October, 1910, on the roundup; he sold Mitchell Peterson four head of cattle about the 4th of July, 1910, for which he was paid \$120 or \$30 a head.

Rec. 87.

The four head were picked up by Bostwick on

the Roundup but he doesn't remember the brands of any of them.

Rec. 88, top of page.

It was claimed by the District Attorney that these four head of cattle are the cattle described in Count 4 of the indictment.

Rec. 87.

This witness testifies that "this Bryan Connelly steer was picked up on the roundup two or three months afterwards." That is, the Bryan Connelly steer described in the fourth Count of the indictment, was picked up by Bostwick two or three months after the sale in July, 1910, of the first bunch of four head.

Some of the cattle sold by Bostwick to the Petersons, were stolen while others were not.

Rec. 93.

This witness further tells us that he never had any understanding with the plaintiff in error about his buying cattle from him, that nothing was every said about it and that he never told him where he got the cattle.

Rec. top page 101.

On cross-examination, Bostwick tells that he had never stolen any stock before, although he had dealt in stock; that he had never been accused of or arrested for stock stealing before; that at the times mentioned by Mr. Freeman, the District Attorney, in his examination, "I had deposits in the Kalispell National Bank and I issued checks on that bank."

Rec. 103.

He further testifies on the same page, that "I bought cattle of Miles Running Wolf and paid for them. I had no permit for that nor did I give any bill of sale for that, I got the animal in a trade. I sold it to Mitchell Peterson and I didn't give him any bill of sale and he didn't ask me for any. This deal was perfectly straight and honest. There were a number of other cattle the same way."

Rec. bottom page 103.

On page 104 of the record, this witness testifies as follows:

"Q. Was the transaction any different as to these that were straight than those that were not?

A. No sir.

Q. Was there anything in the transaction as far as you know that would lead Charles Peterson to suspect that any of these others were stolen any more than the Miles Running Wolf or others that were straight?

A. No sir.

"With reference to Walter it was the same and with reference to Mitchell it was the same, except the blackjack game steer."

Rec. 104.

The witness further goes on to state that he sold four several bunches of cattle to the Petersons at four different times; that he sold cattle before the times mentioned by the District Attorney, to different people; among the number to whom he

had sold cattle was a man by the name of Wetzel and also to Levi Burd, and he had bought cattle from him and never had any trouble about them, and this was before the Peterson cattle transactions.

Rec. 104.

He further says, bottom page 104 and top of page 105, "there were also a number of others with whom I had business transactions of that kind, before I had these transactions with the Petersons. I never had any trouble at all about them. Nobody made any complaint so far as I know." The first bunch of cattle sold to the Petersons was a bunch of four head of two year old steers, sold at Browning, about the first of July, 1910, for \$30 a head or \$120 for the four. The witness says positively that "that was a fair price for the cattle. So far as Mitchell Peterson knew that transaction was just as straight as the one with reference to the Miles Running Wolf animal. There was nothing said or done by me to put Mitchell on his guard as to the animals."

Rec. 105.

The second sale was about the 30th of August, 1910, of seven head of all ages, cows and steers. For these, he received the same price of \$30 a head as shown by the checks in evidence. "That was a fair price for those cattle." This bunch of seven head the witness assisted in delivering at the ranch. "They were branded in broad daylight,

only about one-half a mile from the agent's office, where anybody could see us. There was no concealment about the branding. * * * The cattle were in the corral right near the public highway, where everybody could have seen them if they noticed the place and anybody passing there could see the cattle. There was no attempt to conceal them on the part of the Petersons, everything was done in the broad daylight."

"I was paid in full and that transaction was closed. The amount paid, \$210, I say is a fair price."

Rec. 106.

The third bunch consisted of 16 or 17 head, and Bostwick says he was paid \$500 for that bunch, which "was a fair price." I received in payment two \$175 checks which I have identified."

Rec. bottom page 106.

Full settlement was made, and a satisfactory one.

Rec. 107.

The fourth, and last bunch, was sold about the 20th of October, 1910, and consisted of six or seven head. This bunch was got out of the Burd field. The witness says that the price was \$215, for this bunch, which was all they were worth and that he was paid in full for them, which was the contract price outside of the blackjack steer.

Rec. 107.

"Q. Because you let that go to square that

debt of Mitchell's?

A. Yes.

Q. Taking that into consideration the settlement was made in full and on the square for all the four different bunches?

A. Yes sir.

Q. They didn't owe you a cent?

A. No."

Rec. 108.

The witness then proceeds to tell us that the roundup in Burd's field was the customary and usual roundup at which all the stockmen participated; that as a stockman, he is familiar with the methods pursued when a person buys cattle of another with a different brand than his own. The purchaser vents the old brand, and then the witness is asked this question:

"Q. Was there any difference in the handling of this stock that was stolen and which you sold to the Petersons, and that which you honestly bought and paid for and sold to the Petersons, as to the venting and branding of the cattle?"

"A. No sir."

Rec. 108-109.

Following this, the witness says:

"The old brand on the cattle was not blotched or tried to be disfigured in any way. The new was put on where anybody could see it. The old brand was apparently plain to be seen, it was just the same after the rebranding as before."

Rec. 109.

The witness then tells us that these cattle, were put into the Burd field “so that the people who owned them could come and get them.”

Rec. 110.

On the top of page 111, he says:

“My object in going down there was to cut out the Peterson cattle.

“Q. That was perfectly straight, wasn't it?

“A. Yes sir.”

On page 112, the witness is asked the following question:

“Q. There was nothing crooked about this business in the Burd field?

“A. No sir.”

The T Anchor P Steer.

This animal deserves a caption by itself for the reason that it is the only animal that the star witness for the prosecution, testifies to, as having put plaintiff in error wise to the fact that Bostwick stole it.

Before considering this animal, it should be borne in mind that it is not one charged in any one of the four counts in the indictment.

On page 113 of the record, appears the following, relating to the time when Bostwick, as he claimed, put Mitchell wise to the fact that the T anchor steer was stolen.

“Q. Up to that time, Mr. Bostwick, if I understand you, everything was on the square between

you and the Petersons as to the stock business?

“A. Yes sir.

“Q. Previous to that time you had not indicated anything to them or to Mitchell or anybody else that you had stolen stock or was going to?

“A. No, not that I remember of.”

Following this, he says:

“Up to the last bunch of six head or seven whichever it was, I never told Walter Peterson nor Charles Peterson that any of them were not right,” and that the only person, he ever before told, was Mitchell Peterson.

He then says this: “It is a fact that out of the last bunch there were only one head that I told him wasn’t straight, that one being the T anchor P steer.”

Rec. 113.

It would seem from the Bostwick story that the T anchor P steer was in the Burd field with the other cattle and that it had a very dim brand on it and Bostwick called Melvin Peterson’s attention to it; that they couldn’t make out the brand; that as they were driving the cattle along someone asked, who owned this steer and Bostwick said he did and that Mitchell asked him what he wanted for it, to which Bostwick replied that he would take fifteen dollars for him; that then Mitchell inquired of Bostwick as to the brand on the animal and Bostwick told him he didn’t know. They took the animal into the field and roped him and examined him and

saw it was a T anchor P brand; that Mitchell told him they had better leave the animal alone; that the next day in cutting out the herd and branding them that this T anchor P steer was standing on the side and that Bostwick told Mitchell if he wanted to take a chance on him, that it would be all right with him and that he could take him for the \$18 in settlement of the blackjack game. "We took a chance on him and that is how the T anchor P steer came up."

Rec. 114.

Charles Buck, the last witness, testifies that he was present on the roundup when the difficulty came up with reference to the Bryan Connelly steer; that this steer was in the herd and "that Bryan claimed the steer and Mitchell said it was his." The steer was then roped and the brand examined and found to be Connelly's brand, and Bryan took it; that he asked Peterson how the matter came about and he told him he got the steer from John Bostwick and said to him: "Why Bryan, you know I wouldn't steal a steer from you." He further testifies that there was a Joe Cobell steer in that herd with the Peterson Brand on it and that Connelly was looking for the Joe Cobell steer and that this took place about three weeks before the roundup closed.

Rec. 122-123.

Such is the testimony in this record to prove guilty knowledge on the part of the plaintiff in

error beyond a reasonable doubt. We search the testimony from beginning to end in a vain endeavor to find the semblance of a motive for the commission of this alleged crime. The record is as barren upon this important point as it is likewise barren of any proof of suspicious or incriminating circumstances which accompany and attend the buying and receiving ~~for~~^{of} stolen property, knowing it to be stolen. What possible reason or motive could plaintiff in error have for paying this one-legged Indian, Bostwick, a full price for these cattle and running the risk of going to the penitentiary, when he or any of his brothers, or his father, even, could go out and rustle them quite as well as Bostwick?

All the circumstances surrounding the buying, receiving and branding of all the animals in the four various bunches, conclusively show, and that too by the Government's own proof that defendants handled this Bostwick stock just the same as any others, and likewise according to the Government's own proof, it was utterly impossible to tell or distinguish between the animals that Bostwick sold to plaintiff in error, and which he had bought and paid for, and those which he stole. Everything was open and above board and a fair price was paid for the animals and there is not a single suspicious circumstance connected with the transaction.

There is not a particle of evidence in this record to show that Mitchell Peterson was ever before accused of a crime much less convicted of one.

So far as the record shows, this is the first offense if any. Before he should be convicted of any offense there ought to be sufficient evidence to support a conviction.

Upon Bostwick, and upon him alone, must the Government rely for a conviction in this case, but Bostwick, being an accomplice, must be corroborated, otherwise the prosecution fails. But there is no corroboration in this record. One of the specifications is that the Court erred in refusing to give defendants' requested instruction No. 23, record 187, and being specification 31 in this brief, which instruction requested the Court to charge the necessity of the testimony of an accomplice being corroborated, before a conviction could be had.

Where with these Indians, all wards of the Government, with the exception of Charles Peterson, the father, living upon an Indian Reservation, it is common knowledge, that the habits, actions and mode of living on the reservations, are entirely different from those of white men, and that we cannot judge them by the same standard that we do white men. They are careless in their habits, in their way of transacting business and to judge them by the standard of ourselves, would be a great injustice. But, even if Mitchell were to be judged by our own standards, even then we submit that the testimony is inherently and fundamentally insufficient to support a conviction, and that the judgment should be reversed upon that ground.

FAILURE OF RECORD TO AFFIRMATIVELY SHOW ARRAIGNMENT OR PLEA.

The record in this case fails entirely to show, affirmatively, that appellant was either arraigned or pleaded to the indictment. This record shows that he was put upon trial for an infamous crime without any issue whatever being made. The consequence of which is that the judgment pronounced upon him in this case is the merest nullity and the cause should be remanded for another trial with directions that he be arraigned and plead to the indictment.

Great was our surprise when the discovery was made that there was no record whatever of any arraignment or plea. The records of the Clerk of Court were found to be absolutely silent upon the matter. His record showed the arraignment and plea of the four co-defendants, his father and three brothers, but no record of any arraignment or plea as to Mitchell Peterson. Just how this happened to occur is somewhat uncertain and is not within the clear recollection of counsel. Probably, however, the failure to have Mitchell Peterson arraigned or to have him plead to this indictment, was due to the practice or custom, more or less in vogue, of permitting defendants, who were out on bail and at a great distance from the place where the court was held, to be arraigned and plead on the day set for the trial of their case and thus save the great ex-

pense incident to an extra trip to court for the sole purpose of arraignment and plea. If such were the case, then the matter of the arraignment and plea on the day set for his trial, was entirely overlooked and forgotten by everybody. However, it is immaterial just how it happened. The legal effect is precisely the same regardless of the cause.

Since the record, under all the authorities, must affirmatively show that the defendant in a criminal case, was arraigned and did plead to the indictment, it is, of course, absolutely immaterial as a matter of law, what causes operated to produce such a result.

The only thing, if your Honors please, in this entire record, referring to the matter at all, is the mere recital in the judgment of the Court, and after the preliminary parts of the judgment wherein the defendant is informed of the charge against him, in stating what the charge consisted of, the judgment then recites as follows:

“And of his indictment, arraignment and plea of not guilty and of his trial and the verdict of the jury of guilty as charged in said count one of said indictment.”

Rec. 16.

Further on on said page 16 of the record, the indictment further recites:

“That whereas, the said defendant, having been duly convicted in this court of the offense of feloniously buying, and receiving certain stolen

cattle," etc.

This is all there is in the record upon the matter. That this naked recital in the judgment that the plaintiff in error was arraigned and pleaded to the indictment, is totally insufficient, will abundantly appear in the authorities hereinafter cited.

This whole question was fully considered by the Supreme Court of the United States, in the case of *Crain v. United States*, 162 U. S. 625, 16 Sup. Ct., 952. In an exhaustive opinion of Mr. Justice Harlan the authorities are fully reviewed and the doctrine is emphatically announced that the record must affirmatively show an arraignment and plea, otherwise there was no issue to try and the judgment is a nullity. We quote from the opinion of Justice Harlan in the *Crain* case, page 636, as follows:

"But an objection is made to the proceedings in the court below, which is of a serious character.

"The record does not show that the accused was ever formally arraigned, or that he pleaded to the indictment, unless all that is to be inferred simply from the order, made at the beginning of the trial and as soon as the accused appeared, reciting that the jury were selected, impaneled, and sworn 'to try the issue joined,' and from the statement in the bill of exceptions that the jury were 'sworn and charged to try the issue joined.' What that issue was is not disclosed by the record.

"The Government does not, in terms, claim that

it was unnecessary for the defendant to plead to the indictment. But it assumes (although the record does not state such to be the fact) that the defendant pleaded not guilty, and contends the omission to record that plea is only a clerical error which did not prejudice his substantial rights.”

“By U. S. Rev. Stat. 1025, it is declared that “no indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.”

“Is it a matter of form only whether the accused pleads or does not plead to an indictment for an infamous crime? If it be not a matter of form, then it would seem that if convicted, the fact that the accused did plead should clearly appear from the record, and not be left to mere inference arising from a *general recital* that the jury were sworn to try and did try ‘the issue joined,’ without stating what was such issue. While, as said in *Pointer v. United States*, 151 U. S. 396, 419 (38: 208, 217), all parts of the record are to be interpreted together, so that, if possible, effect be given to all, and a deficiency in one part of it supplied by what appears elsewhere, it was there held that ‘the record of a criminal case must state what will affirmatively show the offense, the steps without

which the sentence cannot be good, and the sentence itself.'

"In capital or other infamous crimes an arraignment has always been regarded as a matter of substance. 'The arraignment of the prisoner,' Lord Coke said, 'is to take order that he appear, and for the certainty of the person to hold up his hand, and to plead a sufficient plea to the indictment or other record.' "

Justice Harlan, quotes from the case of *Grigg v. People*, 31 Mich. 471, as follows:

"An arraignment and plea being imperatively required, the recital of them, if they were taken, was a necessary ingredient of the record.' The judgment was reversed, that the accused might be lawfully arraigned or otherwise dealt with agreeably to law."

Quoting further from the opinion in the *Crain* case:

"In *People v. Corbett*, 28 Cal. 328, 330, it appeared that the defendant, indicted for grand larceny, asked, when brought into court, a separate trial, which was granted; the jury were impaneled; witnesses were introduced by him; the case was argued by his counsel; and the jury, having been charged by the court, returned a verdict of guilty. The supreme court of California said: If the defendant had, at any time anterior to the trial, plead not guilty, the defects in the arraignment, or rather the omission to arraign, might have been cured

on the ground of waiver. But neither the motion of defendant for a separate trial, nor the introduction of witnesses by him, nor the fact that the case was argued on his behalf to the jury, nor did all of them combined, cure the want of a plea. There was not only no arraignment, but over and beyond that there was no issue for the jury to try. Not only did the defendant not plead, but inasmuch as the statutory opportunity for pleading was never extended to him, he was never under any obligation to plead. A verdict in a criminal case where there has been neither arraignment nor plea is a nullity, and no valid judgment can be rendered thereon.' ”

After citing authorities from the states in general and from leading text writers, the decision then proceeds page 644:

“Without citing other authorities, we think it may be stated to be the prevailing rule in this country and in England, at least in cases of felony, that a plea to the indictment is necessary before the trial can be properly commenced, and that unless this fact appears affirmatively from the record the judgment cannot be sustained. Until the accused pleads to the indictment and thereby indicates the issue submitted by him for trial, there is nothing for the jury to try; and the fact that the defendant did so plead should not be left to be inferred from a general recital in some order that the jury were sworn to ‘try the issue joined.’ ”

In the beginning of this opinion, Justice Har-

lan says:

“The transcript before the court must be taken to be as certified, namely, a true and complete copy of the record and proceedings in this case.”

The question is not an open one in this court. Subsequent to the decision in the Crain case, this court, in the case of Shelp et al v. United States, 81 Fed. 694, lays down the same rule. Quoting from pages 700 and 701 of the opinion in the Shelp case:

“The record shows that George Cleveland, one of the defendants, waived arraignment, and entered his plea of ‘not guilty’ to the indictment. It does not affirmatively show that Archie Shelp, the other defendant, was ever formally arraigned, or that any plea was ever entered by him to the indictment. The record is silent upon that question. No objection was ever made in the court below, either during the trial, or upon the motion in arrest of judgment, or upon the motion for a new trial, or in the bill of exception, nor is it assigned as error upon the appeal to this court that defendant Shelp was put upon his trial without any plea being entered to the indictment. It is therefore claimed by the United States that the question ought to be considered as having been waived by the defendant. It is, however, admitted that this court can, in a proper case, ‘notice a plain error not assigned’; that a writ of error addresses itself to the record; and that, if the record itself discloses the ground upon which a reversal is sought, there is no necessity for

a bill of exceptions. If the failure to plead is a mere matter of form, and not of substance, the judgment should not be reversed. Rev. St. U. S. 1025. The authorities, however, are to the effect that, while the arraignment may be waived, the plea is absolutely essential. In capital or other infamous crimes, an arraignment and plea has always been regarded as a matter of substance, and must be affirmatively shown by the record. *Crain v. U. S.*, 162 U. S. 625, 16 Sup. Ct. 952. Until the defendant has pleaded to the indictment, there is no issue to be submitted to the jury, and the omission to plead is fatal to the judgment, even after verdict. This rule applies as well to cases of misdemeanor as to cases of felony. *Douglass v. State*, 3 Wis. 820; *Aylesworth v. People*, 65 Ill. 301; *State v. Williams*, 117 Mo. 379, 22 S. W. 1104; *State v. Hubbell*, 55 Mo. App. 262; *McFarland v. State*, 18 Tex. App. 313; *Roe v. State*, 19 Tex. App. 90; *Bowen v. State*, 108, Ind. 411, 9 N. E. 378; *State v. Cunningham*, 94 N. C. 824; 1 Bish. New Cr. Proc. 733, 1354, and authorities there cited.”

“The bill of exceptions shows ‘that the issue joined in the above stated case between the said parties came on to be tried before the said judge and the jury which was duly impaneled and sworn to try the issues between the said parties.’ From this statement in the bill of exceptions it is argued by the Government that this court should infer that a plea of not guilty was in fact entered, and that

the clerk failed to note that fact in the record. We cannot, in the light of the authorities, draw any such inference. In *Crain v. U. S.*, the court, upon this question, said:

“Until the accused pleads to the indictment, and thereby indicates the issue submitted by him for trial, there is nothing for the jury to try, and the fact that the defendant did so plead should not be left to be inferred from a general recital in some order that the jury was sworn to try the issues joined.’ ”

In *Bowan v. State*, the court said:

“Under the decisions of this court, it can no longer be regarded as a subject of controversy that, where the record in a criminal cause fails to disclose affirmatively that a plea to the indictment was entered, either by or for the defendant, such record on its face shows a mistrial, and that the proceeding was consequently erroneous.”

“If the defendant stands mute, and refuses to plead, the court is authorized to enter his plea of not guilty. Rev. St. U. S. 1032. But a trial without the entry of any plea by or on behalf of the defendant is invalid.”

“It follows from the views above expressed that the judgment of the district court as to the defendant Cleveland must be, and is hereby, affirmed, and that the judgment against the defendant Shelp must be, and is hereby reversed, and the cause remanded for a new trial.”

Wyburg vs. U. S., 163 U. S. 648.

In the case of *United States v. McKnight*, 112 Fed. 983, it is said, following the *Crain* case:

“And it might be conceded to be quite true that if the record, on its face, did not show that an arraignment of the accused had taken place, and especially if it did not affirmatively show that he had pleaded to the indictment, then no issue had ever been framed for the jury to try, and the court should regard all that has been done at the latest trial, as a mere nullity.”

As seen from the foregoing the mere recital in the judgment that the plaintiff in error, was arraigned and plead not guilty to the indictment, is no such record as the law requires. That is only the stereotyped form common to all judgments in criminal cases. It is, indeed, much less than appeared in the record of the *Crain* case or in the *Shelp* case. Where the record recited that the “issues were tried,” and it was contended that that meant an arraignment and a plea, the court held the record fatally defective.

Since it would appear that the judgment must be reversed and the cause sent back for another trial, it might be said that the consideration of the other assignment of error was unnecessary. This, we must freely confess, is true. However, since it appears that the cause should be tried again, it seems very desirable that this court should pass upon the other assignments of error in order to

guide the lower court in a subsequent trial of this case. For this reason, the other assignments are canvassed in this brief.

The plaintiff in error respectfully insists that he was not convicted of the offense charged according to law, and that the judgment should be reversed and the cause remanded for a new trial.

All of which is respectfully submitted.

W. F. O'LEARY, and
E. A. CARLETON,
Attorneys for Plaintiff in Error.

Due service of the foregoing brief is hereby admitted this 5th day of January, 1914.

B. H. Wheeler
United States District Attorney.

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

MITCHELL PETERSON,

Plaintiff in Error,

v/s.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief and Argument of Defendant in Error

The statement of the case contained in the brief of plaintiff in error omits any mention of the cow branded 17 on the left ribs, which was the property of Bad Marriage, an Indian person. This cow was described in the first count of the indictment with those mentioned by plaintiff in error on page 2 of his brief (Rec. 2). It was admitted by plaintiff in error and the evidence shows that this cow was one of the bunch received by plaintiff in error from John Bostwick on October 21, 1910 (Rec. 34, 102, 132).

We will follow the argument of plaintiff in error as it is contained in his brief.

SPEED TRIAL.

Assignments of error numbered 1 and 2 (Rec. 178) are directed to the alleged error of the trial court: First, In refusing to dismiss the indictment against plaintiff in error; and, second, In overruling the objection of plaintiff in error to the introduction of any evidence. The motion and objection were both based upon the ground that plaintiff in error had been denied a speedy trial in violation of his constitutional right. In the brief of plaintiff in error stress is laid upon the fact that the indictment in the case at bar was found December 21, 1910, and he was not finally tried until March 26, 1913; but it should not be overlooked that a trial and conviction was had under this indictment and thereafter on October 14, 1911, this conviction was set aside by the trial court, and a new trial granted at the instance of the plaintiff in error. This being the fact, we are only concerned with the time that elapsed between the 14th day of October, 1911, the date of the granting of said new trial, and the 26th day of March, 1913, the date of the commencement of the last trial.

The trial court denied the motion to dismiss the indictment and overruled the objection to the introduction of any evidence upon the trial, upon the grounds that the same were not made in time and further that notice thereof, as required by the rules of court, had not been given (Rec. 29-30). The motion to dismiss the indictment was served upon the District Attorney

on March 24, 1913, only two days before the time set for the trial of the case (Rec. 20) ; and the affidavits, on which the motion was based, were not, curiously enough, served with said motion but were served only one day before the trial, to-wit, on March 25, 1913 (Rec. 27).

Rule No. 37 of the United States District Court of Montana provides:

“Whenever, in an action at law or suit in equity, notice of a motion is necessary, it shall be in writing, and shall state in general terms the grounds of the motion and the papers on which it is to be made * * * If the person to be notified and the person who is to give notice have their offices in the city in which court is to be held, the notice must be given at least five days before the day named for the hearing of the motion. In other cases the notice must be given at least ten days before the day named for the hearing * * *

“If any fact on which the motion is based be not documentary in character, it shall be shown by affidavit, or affidavits of persons within whose knowledge such fact is, and copies of such affidavits shall be served with the notice of motion.”

The barest inspection of the record makes it apparent that this rule was in two respects violated by the motion of plaintiff in error to dismiss this indictment. Five days' notice of said motion was not given, nor indeed, so far as the record discloses, any notice thereof. But if the service of the motion itself could be held to be a notice that it would be brought on for hearing at a specified date, the rule was violated as the

motion was served only two days before the hearing had thereon and the beginning of the trial. Said rule was additionally violated in that the affidavits on which the motion was based were not served with the motion, but, as a fact, were served later and only one day before the commencement of the trial. This rule clearly contemplates that one required to respond to a motion shall have at least five days' notice thereof and if the same is supported by affidavits, as in the case at bar, that he shall have five days in which to prepare counter-affidavits; for the rule explicitly provides that a motion can be brought on for hearing only upon five days' notice thereof, and the affidavits must be served with the notice. This would always give a party resisting the motion five days in which to prepare counter-affidavits if he so desired. The trial court was therefore clearly justified in denying the motion upon the ground that the same did not comply with the rules of court.

But without regard to the foregoing this motion was, not only on principle, but under the express terms of the rules of the trial court, addressed to the discretion of the court. Rule 49, subdivision 3, adopted by the United States District Court for the District of Montana on September 6th, 1912, provides that

“Every cause whether criminal, at law or in equity, in which no forward step is taken for one year, or which is not brought on for trial within one year after issue joined, may be dismissed for

want of prosecution unless good cause to the contrary be shown, *or the court in its discretion in criminal cases otherwise orders,* * * *
(Italics ours.)

Under familiar principles a court possesses the right to adopt reasonable rules, and likewise has the right to construe its own rules and enforce them. The enforcement and construction of its rules by a court is a discretionary matter that will not be interfered with by an appellate court unless the construction is clearly unreasonable and erroneous.

Hoskins v. N. P. Ry. Co., 39 Mont. 394.

Life Ins. Co. v. Francisco, 84 U. S. at 679.

Bank v Albertson, 39 Mont. 414.

Not only will courts take judicial notice of their own rules, but litigants are presumed to have knowledge of the terms thereof and to comply therewith. This being so, by the motion in the case at bar, if it were properly made and noticed, plaintiff in error invoked the discretion of the trial court as to whether or not the indictment against him should be dismissed. Having invoked the discretion of the trial court upon that particular matter he can only predicate error upon an abuse of such discretion. The burden of showing abuse of discretion rests upon the party alleging it—in the case at bar the plaintiff in error.

State Savings Bank vs. Albertson, 39 Mont.
414.

How has plaintiff in error sustained this burden?

The record herein fails to disclose a request for a continuance by either the plaintiff or defendant in error. The affidavits relied upon by plaintiff in error to support his motion merely state: that plaintiff in error and his counsel were anxious to have the case tried and disposed of; that they "seriously doubted whether or not the government would ever try said cause or put the defendants again on trial under said indictment, but have been expecting that the aforesaid indictment would be dismissed and this impression has grown stronger the longer the government has delayed to have said causes tried again;" the remaining averments in said affidavits are merely bald conclusions and contain no positive statement of fact tending in any manner to show the slightest abuse of discretion on the part of the trial judge. (Rec. 21-27.)

But if plaintiff in error and his counsel were anxious to have this case tried and disposed of why was no motion made to have the same set for trial; and particularly is the record silent as to any objection of plaintiff in error to said cause being passed at the various terms of court, held, between the date of the granting of the new trial to plaintiff in error and the 26th day of March, 1913. It is difficult to perceive what bearing upon this motion the allegations in the affidavits have, to the effect that plaintiff in error and his counsel seriously doubted whether any trial would ever be had, or the allegation that they had expected this case to be dismissed. One under indictment is beyond doubt subject to trial regardless of his expecta-

tions or doubts. At any rate in the case at bar the affidavits fail to disclose any prejudice resulting to plaintiff in error by reason of his expectations and doubts unless indeed it be his subsequent trial and conviction.

The record further discloses the fact that plaintiff in error was at liberty on bail from the time of his arrest (Rec. 11, 13). As indicated above the affidavits tendered do not disclose that plaintiff in error ever requested that the indictment against him be brought on for trial. Additionally there is no showing whatever in the records that the delay between the granting of the new trial on October 14, 1911, and the second trial on March 26, 1913, was not founded upon a good and sufficient reason and adequate cause. Without any affirmative showing of this character, this court will presume that the trial court acted properly and that adequate cause for its action existed. Clearly if any such cause did exist, it was incumbent upon plaintiff in error to so show by his affidavits. A mere lapse of time is not sufficient to justify a dismissal.

State Savings Bank v. Albertson, 39 Mont. 414.

State v. Nugent, 71 Mo. 147.

The case of *People v. Douglass*, 100 Cal. 1, 4; 34 Pac. Rep. 490, 491, holds that in the absence of any affirmative showing error will not be presumed by an appellate court, and places upon the appellant the burden of showing by his record the facts consti-

tuting the error. In that case there was nothing in the record but the motion for a dismissal and the ruling of the court in denying the same. In the cause under consideration there is nothing but the motion, the order of court denying the motion, and the affidavits, which are barren of any fact showing how the plaintiff in error was or might be prejudiced by reason of the delay claimed by him to be violative of his constitutional right to a speedy trial.

The case of *People v. Marino*, 85 Cal. 516, cited in the brief of plaintiff in error, is not in point for the reason that it construes a statute of California, which in positive terms requires the prosecution in a criminal action not brought on for trial within the time specified by said statute, to either show a sufficing reason for the delay or suffer a dismissal of the action. In other words the burden under the California statute is upon the prosecution to make a showing, while under elementary principles the burden is upon the defendant to bring himself within the terms of the VI. Amendment of the Constitution of the United States and to show that his rights have been violated. In addition the case of *People v. Marino* is expressly disapproved by the court deciding the same in *People v. Douglass*, *supra*.

The affidavits in the case at bar entirely fail to make an affirmative showing that no sufficing reason existed for the delay in the case at bar.

It hardly seems necessary to cite authorities to

sustain the proposition: That a man cannot sit idly by thinking his case will never be tried, and when he learns it is set for trial, wait until a jury and witnesses are present in court, then bring up for hearing a motion to dismiss supported by affidavits such as are in this case, all without the proper notice of the hearing of said motion or affording to the government an opportunity to file counter-affidavits. If plaintiff in error objected to what he claims to be a long delay, he should have requested the court to set the case for trial at one of the terms of court that was passed. His failure, at any time, to make such a request, and waiting until the day of the trial to move for a dismissal comes too late.

A demand for a trial is a condition precedent to the right of discharge for delay in trial.

Hernandez v. State, 4 Tex. App. 425.

In the case just cited a principal had been convicted under other indictments and an accessory was held not entitled to his discharge on habeas corpus under Texas Constitutional Bill of Rights, Art. 1, §10, guaranteeing that the accused shall have a speedy public trial, where no showing was made that accused had ever demanded or been refused a trial. This constitutional provision of Texas is practically identical with the VI. Amendment to the Constitution of the United States.

See also, the case of Dillard v. State, 46 S. W.

533-534, where, on facts very similar to the case at bar, it was held that no error was committed in refusing to dismiss the cause on motion of the defendant, although there was a statute defining the meaning of the constitutional provision guaranteeing accused a speedy trial.

In the case of *Dillard v. United States*, 141 Fed. Rep. 303, 306, it was held that the refusal of the court, during the taking of testimony in a criminal case, to permit the presentation of a motion to dismiss as to certain counts of the indictment, was a matter entirely within its discretion.

In the case of *People v. Henry*, 77 Cal. 445, 19 Pac. Rep. 830, 831, in passing upon the question of error in refusing to grant a motion to dismiss, the facts being as follows:

“On the 3rd of September the case was set for hearing on the 25th of September, 1888. On that day before the trial commenced, the defendant by his counsel, moved the court to dismiss the case, and discharge the defendant, on the ground that his case had not been brought to trial within 60 days after the filing of the information. Affidavits were filed by both sides upon the motion, which was then denied by the court, the defendant excepting. The trial then proceeded and the defendant was found guilty of burglary in the first degree.”

and the Supreme Court of California held:

“There was no error in the refusal of the court

to dismiss the case upon the defendant's motion, made under subdivision 2 of §1382 of the Penal Code. There was no abuse of discretion within the rule laid down in *People v. Camilio*, 69 Cal. 540."

See also: *State Savings Bank v. Albertson*, 39 Mont. at page 420, 421.

Strong v. Grant. 99 Cal. 100, 33 Pac. Rep. 733.

In the case last cited the question is most ably discussed both in the opinion by the court and the concurring opinion by Chief Justice Beatty, and the Supreme Court of California expressly held in said case:

"When a motion is made for the discharge of a defendant under this section, the question involved is a judicial question, involving in its decision the exercise of judicial discretion* * *"

The case of *U. S. v. Fox*, 3 Mont, 512, cited by plaintiff in error is clearly not in point, for the reason that Fox had demanded a trial and urged a disposition of his case.

The case of *Beavers v. Haubert*, 198 U. S. 86, also has no application to the question under consideration, as it only holds that the removal of the accused from one jurisdiction to another was not the refusal of a speedy trial.

It is likewise to be observed that the other cases cited by plaintiff in error have no bearing upon this question as they all arose under statutes peculiar to

the various jurisdictions they are from. Plaintiff in error was bound by Rule of Court 49-3, and in the absence of any showing that the trial court abused its discretion in denying the motion the judgment should not be reversed.

ADMISSIBILITY OF EVIDENCE.

The evidence which plaintiff in error claims was improperly admitted and greatly prejudicial to him is all in relation to certain other cattle found in his possession at the same time the cattle described in the indictment were alleged to have been received by him (Rec. 37-41). The owners, of these cattle not described in the indictment and to which this testimony related, all testified that: they had turned the cattle out on the range and had not seen them again until they found them in the government corral at the agency; all this was within a short time prior to the time plaintiff in error is charged by the indictment with receiving the cattle mentioned therein; that these cattle had never been sold, but had been stolen and branded with the Peterson's brands and that the placing of such brands upon them was wholly unauthorized (Rec. 64-78).

The evidence was relevant only and introduced solely for the purpose of showing intent and guilty knowledge on the part of plaintiff in error, and the court so charged the jury (Rec. 63; 146-147).

In cases where accused is charged with receiving stolen property, evidence of his having other stolen

property in his possession, especially of a like character, is always admissible for the purpose of showing intent and guilty knowledge on the part of accused that the property for receiving which he is charged was stolen. This is one of the well recognized exceptions to the general rule that evidence of a separate and distinct crime, unconnected with that laid in the indictment, cannot be given in evidence.

State v. Crawford, 39 S. C. 343, 17 S. E. Rep. 799.

Commonwealth v. Hills, 10 Cush. 530.

Commonwealth v. Johnson, 19 Atl. Rep. 402.

State v. Habib, 18 R. I. 558, 30 Atl. Rep. 462.

Beuchert v. State 155 Ind. 523, 76 N. E. Rep. 111.

People v. Clausen, 120 Cal. 381, 52 Pac. Rep. 658.

Sapir v. U. S. 174 Fed. 219.

In Wharton's Criminal Evidence (10th Ed.), § 35 at page 135, the rule is stated as follows:

“In prosecutions for receiving stolen goods, guilty knowledge is the gist or substance of the offense to be established by the prosecution; and evidence of collateral offenses is admissible to establish such knowledge.”

Counsel for plaintiff in error contends there is no evidence in the record to show when these other animals were stolen or when they were bought or received. The record shows they were in the possession

of defendant (Rec. 37-41) and also the owners testified that they were all stolen (Rec. 64-78) and that the thief, Bostwick, testified that he had delivered some of them (Rec. 86-122), and plaintiff in error swore under oath that he had received the P lazy S cow (Rec. 132), and the owners all recovered these various animals from the bunch of cattle found in the possession of plaintiff in error (Rec. 64-78).

The testimony of the owners that property was stolen and of the thief that he stole it is sufficient to prove the character of the other stolen goods not mentioned in the indictment.

People v. Clausen, 120 Cal. 381, 52 Pac. Rep. 658.

In addition to the above, the fact that a man has possession of goods shown to be stolen is all that is required under the rule permitting evidence of his possession to be admitted, and the cases cited herein so hold, eye-witnesses of his receiving are not necessary.

The Supreme Court of South Carolina in the case of State v. Jacob, 30 S. C. 131, 8 S. E. Rep. 698, 700, in passing upon the question of the admissibility of evidence of this kind in a case where a person was accused of receiving stolen goods, said:

“It does not seem to use that there was any error in receiving the testimony which is made the basis of the second and third grounds of appeal. As appears from the extract made from the

judge's charge above, this testimony was received solely as a circumstance tending to show guilty knowledge on the part of the defendants, and the jury were carefully instructed to consider it only in that light * * * So here, while the fact that one has received a single article of stolen goods would afford but slight, if any, evidence that he knew such article was stolen, yet if it is shown that he has received a number of articles of stolen property, especially where, as in this case, such articles were shown to have been stolen from the same person, and probably about the same time, this is a circumstance from which guilty knowledge may be inferred, though the weight to be attached to such circumstance is exclusively for the jury."

It is not necessary that the property not described in the indictment should have been stolen from the same person or be of the same character, in order to render evidence that they were in the possession of a defendant admissible.

The Court of Appeals of New York, in the well considered case of *People v. Doty*, 175 N. Y. 164, 67 N. E. Rep. 303, said:

"Our conclusion, therefore, is that neither authority nor principle require us to hold that, in prosecutions for receiving stolen property, evidence of other receivings by the same defendant from the same thief can be admitted upon the question of a defendant's guilty knowledge only in cases where the different thefts have been made from the same owner; but, on the contrary, we think there are cases, of which the one at bar is a

fair sample, in which the guilty knowledge of a defendant in the receiving of property charged in the indictment to have been stolen may be established by evidence of other receivings from the same thief, although in each case the property may have been taken from a different owner."

See also: *State v. Jacob*, 30 S. C. 131, 8 S. E. Rep. 698.

In the case of *Harwell v. State*, 22 Tex. App. 251, 2 S. W. Rep. 606, the court said:

"The defendant objected to the testimony in relation to two yearlings not mentioned in the indictment, he being charged with respect to only one of said animals. The objections were overruled and he excepted. We are of the opinion that said testimony was properly admitted for the purpose of proving fraudulent intent on the part of the defendant with respect to the yearling named in the indictment and knowledge on his part at the time of receiving said yearling that it was stolen property."

The case of *Morgan v. State* (Tex.) 18 S. W. Rep. 647, is one in which the facts are very much like the case under consideration, and in passing upon the question of the admissibility of evidence tending to prove the receiving of other stolen property by the defendant than that charged in the indictment the court said:

"This evidence was offered for the purpose of showing the intent of the defendant with reference to receiving the cattle mentioned in the indictment. This testimony was objected to by the defendant,

because the cattle had not been taken about the same time and place as that charged in the indictment, and because it was not shown that the defendant received said cattle at the time and place and from the same parties from whom he had received the one head of cattle alleged in the indictment. It is further shown by the qualification of the judge to this bill of exceptions that, after the state closed its evidence, this testimony, as objected to by the defendant, was withdrawn from the jury, and they were instructed by the court, that the defendant had not been connected with the said cattle, and they would not consider it for any purpose. We are of the opinion that the testimony was admissible in the first instance, and that the defendant cannot complain, inasmuch as the court withdrew the testimony from the consideration of the jury, and told them not to consider it for any purpose. We are of the opinion that the testimony should have been admitted as it tended to prove the fraudulent intent upon the part of the defendant with respect to receiving the one head of cattle named in the indictment, and with knowledge on his part at the time he received said yearling that it was stolen. *Harwell v. State*, 22 Tex. App. 251, 2 S. W. Rep. 606. It also tended to show a systematic plan on defendant's part to commit the crime charged. *Hennessey v. State*, 23 Tex. App. 340, 5 S. W. Rep. 215. *

* * * Though the animals may have been received by him at different times or different days, still we are of the opinion that the evidence was legitimate to show defendant's intent, as well as knowledge on his part that they were stolen property. All these animals were subsequently found by parties owning or claiming them, in

Owen's pasture in the Indian Territory, where they had been placed by Owens after the delivery of the same by defendant."

That the case of *Prettyman v. U. S.*, 180 Fed. 30; 103 C. C. A. 384, cited by plaintiff in error, is not an authority in his favor but sustains the rule above advertised to, the barest inspection thereof discloses:

"* * * * where the intent with which an act charged to be criminal has been done becomes important, as it necessarily is in this case, then, within certain limits, proof of similar acts of the accused is admissible in order to show the intent with which the act charged in the indictment was done."

What pertinency to the case at bar the case of *Brewer v. U. S.*, 139 U. S. 288, cited by plaintiff in error, has, is difficult to understand, as the only question there passed upon was the sufficiency of an indictment to which a demurrer had been interposed.

WITHDRAWING TESTIMONY FROM THE JURY.

The trial court in ruling upon the objections to the testimony, mentioned in the last subdivision of this brief, properly stated that he permitted such testimony to be introduced only for the reason that it was a circumstance which the jury were at liberty to consider in finally determining whether plaintiff in error had guilty knowledge that the goods described in the indictment were stolen. (Rec. 63.)

The court further emphasized the purpose for which this evidence was permitted to be introduced in his instructions to the jury. (Rec. 146-147), and at the same time withdrew from the consideration of the jury all testimony relating to any animal not described in the indictment, except the T Anchor P steer belonging to Dave Pambrum, the TS cow belonging to Brocky, and the CZ steer belonging to Flat Tail. (Rec. 147.)

Under the rule laid down by the authorities cited in the preceding subdivision of this brief, all of such testimony was properly admitted in the first instance, and plaintiff in error has not been prejudiced by that portion of the testimony which was withdrawn from the consideration of the jury by the instructions.

In the case of *Morgan v. State*, *supra*, the same kind of testimony was introduced, and later withdrawn from the jury by the court, and the appellate court held that had the evidence been improperly admitted the withdrawal of it cured the error.

The Supreme Court of the United States, in passing upon the question of whether error committed in the admission of irrelevant testimony was subsequently cured by an instruction of the trial court telling the jury to disregard it, said:

“The charge from the court, that the jury should not consider evidence which had been improperly admitted, was equivalent to striking it out of the case. The exception to its admission fell when the error was subsequently corrected by

instructions too clear and positive to be misunderstood by the jury. The presumption should not be indulged that the jury were too ignorant to comprehend, or were too unmindful of their duty in that respect, instructions as to matters peculiarly within the province of the court to determine. It should rather be, so far as this court is concerned, that the jury were influenced in their verdict only by legal evidence. Any other rule would make it necessary in every trial, where an error in the admission of proof is committed, of which error the court becomes aware before the final submission of the case to the jury, to suspend the trial, discharge the jury and commence anew. A rule of practice leading to such results cannot meet with approval."

Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. Ed. 145.

The case of Throckmorton v. Holt, 180 U. S. 549, cited by counsel for plaintiff in error is not in point. In that case the court only held that certain evidence improperly admitted at the trial was not properly withdrawn from the consideration of the jury by the trial court, inasmuch as the court did not specifically draw the attention of the jury to what particular evidence was withdrawn and the names of the witnesses who gave it, in a manner calculated to be understood by the jury. In the case at bar the trial judge was most specific in his charge to the jury and indicated with great particularity exactly what testimony was and what was not to be considered by the jury.

BOSTWICK WAS AN ACCOMPLICE.

Plaintiff in error contends that the witness Bostwick was an accomplice and the court erred in refusing to give to the jury his requested instruction No. VII.

It should be borne in mind that Bostwick was the person who had stolen the cattle described in the first count of the indictment, had pleaded guilty of larceny—was the self-confessed thief of such cattle.

In Wharton's Criminal Evidence (10th Ed.) §440, p. 922 an accomplice is described as follows:

“An accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of a crime. The co-operation must be real and not merely apparent.”

Can Bostwick be said to come within the meaning of this definition? His crime was the larceny of the cattle described in the indictment, and the crime for which plaintiff in error had been indicted was the receiving of such stolen cattle knowing them to have been stolen. Can the acts of these two parties be said to have been committed knowingly and voluntarily with a common intent?

Section 287 of the Criminal Code of the United States defines larceny and section 288 of the same code defines the receiving of stolen goods. These two sections make the doing of either a crime. These two crimes are made separate and distinct offenses and the

commission of either one does not involve the commission of the other, except that the goods received must have been stolen and the receiver have obtained possession of them with a knowledge of the stealing. It is not necessary to secure the conviction of a person charged with receiving stolen property to prove that the thief had been convicted for the theft of such property, all that is necessary in that behalf is to show that the property received by the defendant was received with a knowledge of its having been stolen.

Kirby v. U. S., 174 U. S. 53-60.

Birdsong v. State, 48 S. E. 330.

Springer v. State, 102 Ga. 447, 30 S. E. 971.

“By statute now in most, if not all, jurisdictions receiving stolen goods is made a separate and substantive offense.”

34 Cyc. p. 515 and cases cited in footnote 7.

“Since modern statutes made receiving stolen goods a substantive offense the *offenders under them are not accessories*, and it is not necessary for a conviction to show that the principal thief has been convicted.” (Italics ours.)

34 Cyc. p. 519.

Leonardo v. Territory, 1 N. Mex. 291.

Wright v. State, 57 S. E. 1050.

Engster v. State, 10 N. W. 453.

State v. Greenburg, 59 Kan. 404, 53 Pac. 61.

However, for the sake of argument, only, let us concede that Bostwick was an accomplice, still under

the common law his testimony did not have to be corroborated, and in the absence of a statute requiring it it does not have to be corroborated now.

We concede that the general rule, under statutes requiring it, is that the testimony of an accomplice must be corroborated. This rule, however, is only because of the statutory requirements. There is no statute of the United States requiring the testimony of an accomplice to be corroborated, and, in the absence of such a statute, the rule is as stated in Wharton's Criminal Evidence (10th Ed.) pages 926, 927:

“In the absence of a statute requiring corroboration, a conviction may be sustained on the testimony of an accomplice alone.”

Plaintiff in error's requested instruction No. VII. was properly refused and the instruction given to the jury by the trial court (Rec. 165) is the rule that has always been followed in the United States' Courts. It is likewise to be noted that the contention of plaintiff in error that the rule governing the testimony of an accomplice in Federal courts is the same as in the State courts is incorrect.

The decisions of the Circuit Court of Appeals of the Second Circuit sustain the refusal of the trial court in the case at bar and approve the instruction he gave as to Bostwick's testimony. In the case of *Hanley v. U. S.*, 123, Fed. 851, the court said:

“It is further argued that the court erred in refusing to charge that the testimony of William A.

Clark, he being a self-confessed accomplice, must be corroborated as to some of the material facts. The statutes of New York do not permit conviction in the courts of that state on the uncorroborated testimony of an accomplice. Those statutes, however, do not regulate proceedings in the federal courts, there is no similar federal statute, and in the courts of the United States the rules of law governing the reception and consideration of the testimony of accomplices are those of the common law. Upon this branch of the case the court, calling attention to the fact that the New York statute did not apply, instructed the jury as follows: 'It appears from the testimony that Clark was an accomplice; that is admitted by Clark as well as by the government. * * * Courts have always regarded the testimony of admitted accomplices with considerable suspicion; and it is perfectly proper for me to say that before you give the testimony of Clark full credit you should carefully scrutinize his testimony. * * * * you should compare it with other testimony in the case for the purpose of ascertaining whether or not it is corroborated. If, as a result of the examination which you give to the evidence—to all of the evidence in the case—you conclude that his testimony with respect to a material part is corroborated, then and in that case you are justified in giving full credit to the testimony of Clark. * * * The common-law rule is that accomplices are competent witnesses against their criminal associates. * * * For that reason the testimony of Clark is submitted to you for your consideration. As, I have already stated, you are required to give it careful consideration.'

"The defendant was not entitled, under the

authorities, to insist upon more specific instructions as to the corroboration of Clark's testimony." (Citing many cases.)

And this case was approved by the same court in the case of Ahearn v. U. S., 158 Fed. 606, 607, where the court said:

"The court charged the jury as to the weight to be given to the testimony of an accomplice, as to felonious intent, and as to the presumption of innocence. The testimony of the accomplice was corroborated as to several material facts, *although corroboration is not essential in the federal courts.* (Hanley v. United States 123 Fed. 851, 59 C. C. A. 153), and could not have been withdrawn from the jury. It was for them to say what weight should be given to it." (Italics ours.)

In the case of Richardson v. U. S., 181 Fed. 1, where the court refused a request almost identical with the one refused in the case at bar, and the court instructed the jury almost in the same terms as was done in the trial of the present case, the Circuit Court of Appeals, Third Circuit, most ably discussed the subject saying:

"It is finally urged that the jury were allowed to convict on the uncorroborated testimony of accomplices, without being warned as to the caution with which such testimony is to be received. It is denied by the government that the clerks who made the false entries under the direction of the defendant were in any sense accomplices; and the requests in which it is assumed that they were could not therefore have been affirmed. But in

those where this mistake is avoided, the court was asked to charge that if these witnesses were accomplices their testimony was not to be regarded unless corroborated by unimpeachable testimony in some material point. This went far beyond the accepted rule and was properly refused. There is nothing which forbids the conviction of a defendant, at common law or in a federal court, on the uncorroborated testimony of an accomplice, as is there assumed. 12 Cyc 453; *United States v. Giuliani* (D. C.) 147 Fed. 594. No doubt there is a well established practice, sanctioned by long practice and judicial approbation to caution juries about accepting the evidence of accomplices without material corroboration, coming, as it does, from a polluted source. But this is as far as the matter goes. See *Holmgren v. U. S.* 217 U. S. 509, 30 Sup. Ct. 588, 54 L. Ed—. And corroboration not being indispensable, an instruction that the credibility of a witness is weakened by its absence, and that the jury ought to acquit where there is none, encroaches on the prerogatives of the jury who have the right to rely on such evidence if they are satisfied with it. (12 Cyc. 600); and the court may therefore, without error, refuse to charge that they ought not. *Commonwealth v. Bosworth*, 6 Gray (Mass.) 479. The requests were more than cautionary. They went the full length of declaring that the testimony of the witnesses, if accomplices, without being corroborated by other unimpeachable testimony in some material part was not to be believed. To have given these instructions would have been a clear mistake. The court may not have said all in this direction that it might. But it did say that the evidence was to be carefully

scrutinized, which called the attention of the jury to their duty in this regard, and it was not bound to say more.”

While it is remarkable to note that no authority is cited by plaintiff in error sustaining his contention that the rule governing the testimony of accomplices is the same in federal courts as in state courts, it is more remarkable to learn on a reading of the cases cited by him that the case of *Reagan v. U. S.*, 157 U. S. 301, sustains our contention that there was no error in the court’s refusal to give requested instruction No. VII., requested by plaintiff in error. In that case the court said:

“The court should be impartial between the government and the defendant. On behalf of the defendant it is its duty to caution the jury not to convict upon the uncorroborated testimony of an accomplice.”

and this is exactly what the trial court in the case at bar did.

The case of *Grim v. U. S.*, 156 U. S. 604, in no manner sustains the contention of plaintiff in error, for the reason that that case merely holds that a detective’s actions, such as are disclosed by the facts of that case, in securing evidence, were proper.

INSTRUCTIONS OF THE COURT. GUILTY KNOWLEDGE.

Counsel for plaintiff in error devotes many pages of his brief in an endeavor to show that error was com-

mitted by the trial court in its instruction to the jury. The particular error urged in said brief is predicated upon those portions of the court's instructions, in which the jury was told what constituted knowledge that the goods received were stolen, and how that fact of knowledge was to be determined by the jury. That these portions of the instructions quoted by plaintiff in error are a series of propositions can hardly admit of doubt.

The rules of the Circuit Court of Appeals for the Ninth Circuit provide:

"The judges of the district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts, and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court."

Rule 10.

The record is barren of any specific exception, taken by plaintiff in error, to any portion of the instruction, given to the jury, defining knowledge. The only exceptions of plaintiff in error to the instructions of the court that can even be thought to have been directed to the quotations from the instructions contained in the brief of plaintiff in error, are:

"I think the defendants, jointly and severally,

will except to that portion, for the sake of the record as to all those portions of the charge which imply or suggest that anything less than knowledge would be sufficient to convict." (Rec. bottom page 166, top page 167.)

"Also to the modification which the court gave of instruction No. 9 and also to the refusal of the court to give the modification in instruction No. 1 of instruction No. 4." (Rec. 167.)

How can such exceptions, as those above quoted, be said to comply with rule 10, *supra*, and have been directed to the specific portions of the instructions given to the jury which counsel for plaintiff in error so strenuously insists were error? There is nothing in the record showing: that plaintiff in error stated "distinctly the several matters of law in such charge to which he excepted" or that he deemed the definition of knowledge given by the court to the jury to be improper, or that he objected to all the portions of the charge which he quotes in his brief. The exception was first directed to anything "that would imply or suggest that anything less than knowledge would be sufficient to convict." That of necessity was confined to that portion of the charge which told the jury that defendants must have had knowledge of the character of the stolen goods at the time of the receiving and cannot be held to apply to the courts instructions defining knowledge. It cannot be said that all of the points raised in the brief were called to the attention of the court by the exception taken on the trial.

In those portions of the charge quoted in the brief of plaintiff in error nothing is said by the court that would imply or suggest that anything less than knowledge was sufficient to convict. The court told the jury that the cattle must have been received with a knowledge, on the part of the defendants, that they had been stolen (Rec. 150), and the court then carefully explained to the jury that knowledge need not be shown by eyewitnesses or by positive testimony, but the fact that defendants had knowledge could be inferred from circumstances proven by the evidence (Rec. 150-154) and finally the court said:

“From the circumstances and the testimony, the evidence as it is before you, you must be satisfied, and they must show, beyond a reasonable doubt, that the defendant * * * knew the property was stolen.” (Rec. bottom page 153.)

The law is too well settled to admit of doubt that a defendant must specifically point out to the trial court the exact portion of the instructions that are excepted to and must also direct the attention of the trial court to the particular language which is claimed to be an erroneous statement of law.

In passing upon the sufficiency of an exception to instructions, the Supreme Court of the United States, in the case of *Allis v. U. S.* 155 U. S. 117, 122, said:

“To the charge, of which the only portions preserved in the record are those just referred to, a single exception was taken in the following

words: 'The defendant excepts to the action of the court in recalling the jury and in arguing the testimony and stating part of the testimony on certain points without stating the entire testimony. It is now insisted that the court expressed an opinion as to the inference to be drawn from the facts, argued the question of intent to the jury and sought to coerce a verdict. But the exception taken is not sufficient to bring all these matters before us. There is no intimation in the exception that the defendant at the time thought that the court was trying to coerce the jury, or suggested that its language might have such an influence upon them. Evidently the claim of coercion is an afterthought from subsequent study of the record. But it is settled that no such afterthought justifies a reviewing court in reversing the judgment. A party must make every reasonable effort to secure from the trial court correct rulings or such at least as are satisfactory to him before he will be permitted to ask any review by the appellate tribunal; and to that end he must be distinct and specific in his objections and exceptions. Rule 4 of this court provides: 'The party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.' Repeated decisions have emphasized the necessity of strict adherence to this rule: 'However, it might pain us to see injustice perpetuated by a judgment which we are precluded from reviewing by the absence of proper exceptions to the action of the court below, justice itself, and fairness to the court which makes the rulings complained of require that the

attention of that court shall be specifically called to the precise point to which exception is taken, that it may have an opportunity to reconsider the matter and remove the ground of exception.' (Harvey v. Tyler, 69 U .S. 2 Wall. 328, 329.) 'If it was intended to save an exception as to distinct propositions embodied in the instructions the attention of the court should have been directed to the specific points concerning which it was supposed error had been committed.' Moulor v. American L. Ins. Co. 111 U. S. 337. 'An exception' to all and each 'part of the charge gave no information whatever as to what was in the mind of the excepting party, and therefore gave no opportunity to the trial court to correct any error committed by it.' Block v. Darling, 140 U. S. 234, 238."

This Court, in the case of Shelp v. U. S., 81 Fed. 700, held, in passing upon exceptions taken to a charge, the following:

"But, if defendant's counsel were of the opinion that the language used in clause ("3") was susceptible of such a construction as to make it the duty of the jury to consider such outside matters (irrespective of the evidence given at the trial), it was their duty to have specifically called the attention of the court to that fact, so that the meaning of the language used could have been amended or explained so as to deprive it of such meaning, or a proper instruction might have been prepared by counsel, with a request that it be given to the jury. It is the duty of counsel to call the attention of the court specifically to the precise point, phrase, or sentence which is claimed

to be erroneous, so as to give the court an opportunity, before the jury retires to correct it. A general exception to a whole charge is insufficient.

‘The rule is well settled that an exception to an entire charge of a court, or to a series of propositions contained therein, cannot be sustained if any portion thus excepted to is sound. This rule is established in nearly every state of the Union, and in all of the national courts, and applies to both civil and criminal cases. *Harvey v. Tyler*, 2 Wall. 338; *Beaver v. Taylor*, 93 U. S. 46, 54 (and many other cases) * * * * In *Harvey v. Tyler* the court said that justice itself and fairness to the trial court ‘require that the attention of that court shall be specifically called to the precise point to which exception is taken, that it may have an opportunity to reconsider the matter, and remove the ground of exception.’ In *Beaver v. Taylor*, the court said: ‘If the entire charge of the court is excepted to, or a series of propositions contained in it is excepted to in gross, and any portion thus excepted to is sound, the exception cannot be sustained.’ ”

The rule laid down in the above cases applies to both civil and criminal cases.

Bram v. U. S., 168 U. S. 572.

Can it possibly be said that counsel for plaintiff in error, by making the exceptions that he did, specifically directed the attention of the court to those portions of the charge, or the particular language, he now claims are covered by his exceptions? The argument of counsel for plaintiff in error, as contained in his

brief, certainly covers every possible phase of objection that anyone could raise to the instructions on this feature. To attribute to any trial judge the ability to understand that such exceptions, as counsel for plaintiff in error made, included all he now contends for such exceptions, would indeed be attributing to such judge the omniscience of the Deity. Judges are only human and cannot intuitively discern the ideas that exist in the minds of counsel. It is for this reason that appellate courts have universally held that exceptions must be specific and directed to the particular language and portions of the instructions they are intended for.

Paraphrasing the language of Mr. Justice Brewer, in the opinion in the case of *Allis v. U. S.*, *supra*. Evidently the claims of counsel for plaintiff in error that the court erred in its definition of knowledge is an afterthought from subsequent study of the record. But it is settled that no afterthought justifies a reviewing court in reversing a judgment.

However, should it be held that the foregoing exception of plaintiff in error is sufficient, it is respectfully submitted that no error was committed by the trial court in charging the jury as it did. These instructions were entirely in accord with the great weight of authority. See cases cited in this brief, *supra*, under title "Admissibility of Evidence."

It is to be further observed that detached portions of a charge should not be considered without a refer-

ence to the rest of the instructions given. Instructions should be read and construed together.

Western M. I. Co. v. Norwich &c Co., 12 Wall. 201, 20 L. Ed. 380.

“Whenever instructions considered as a whole are substantially correct, and could not have misled the jury to the prejudice of the defendant, the judgment will not be reversed because some instruction considered, alone, may be subject to criticism.”

State v. Bartmess, (Ore.) 54 Pac. Rep. 167 and cases cited therein on page 172.

The rule just stated is so well established that further citation of authority is unnecessary.

Under the cases cited in that portion of this brief, entitled “Admissibility of Evidence,” it is shown that evidence of facts showing circumstances, from which guilty knowledge may be inferred, is proper. If the evidence was in the first instance properly admitted it can hardly be said that the court cannot instruct the jury that they have the right to take the same into consideration, if it is believed by them.

It is true that there is some conflict among the authorities as to just what facts and circumstances are sufficient to warrant the jury in finding that the receiver took the stolen goods with knowledge that they were stolen. The weight of authority is in favor of the rule that if the circumstances are such as would charge a reasonably prudent man with knowledge conviction

is proper. In no case has it been held that absolute knowledge must be shown by direct testimony; indeed, it is seldom possible that direct evidence is capable of being introduced on such an issue.

The contention of plaintiff in error that the true rule is an individual test, in each case, cannot be considered here, for under the authorities, *supra*, requiring a definite exception on his part he should have called that to the attention of the trial court, and in the absence of any showing that he was not satisfied with the instructions of the court in that behalf he is precluded from raising the question on appeal.

In the case of *Collins v. State*, 33 Ala. 434, 73 Am. Dec. 426, the supreme court of Alabama, in passing upon an instruction similar to those complained of here, said:

“The charge of the court to which objection is here urged, throwing it into the form of a charge given, may be thus stated without doing violence to any of its terms: ‘If you find the goods had been stolen, then, on the question of knowledge, I charge you, that if you find the defendant received and concealed the goods, and received them under such circumstances that any reasonable man of ordinary observation would have known that they were stolen and if you find that the defendant knew of those circumstances, then you are authorized to find that the defendant knew they were stolen.’

“It will be observed that this charge presents no question of what facts are necessary to constitute

elements of a felonious receiving, under the statute: Code §3178. Its whole force is expended on the question of knowledge. * * * * It simply instructed that body (the jury) that if the specified facts existed, they were authorized—permitted, had authority—to find the fact of knowledge.

“Knowledge of the theft, as an element of the offense, denounced by §3178, could rarely be the subject of direct proof. Like most facts, it may be inferred from other sufficient facts and circumstances. In criminal trials, the jury are charged with the ascertainment of the facts, and in doing so are permitted to draw all reasonable and satisfactory inferences * * * * The charge asserted a correct legal proposition.”

The supreme court of Georgia, citing with approval the words of the decision of said court in *State v. Cobb*, 76 Ga. 666, said in the case of *Birdsong vs. State*, 120 Ga. 850, 48 S. E. Rep. 329, 330, the following:

“ ‘Circumstances may convict of the defendant’s knowledge, as well as actual and direct proof. Indeed, it is rare that knowledge can be brought home to the receiver of cotton or other goods stolen by somebody who knows what the receiver knew touching the fact that they were stolen. The circumstances, the time, the secrecy, all the transactions before, at the time, and afterwards, may be brought to bear upon what was knowledge of the receiver; and if from all these the jury can conclude that the receiver did have good reason, *as a reasonable person, to believe or suspect* that the goods were stolen, they may well conclude, if

he did not inquire and investigate before he received them, that he had knowledge, such as the law will charge him with, of the character of the goods, and of the person from whom he received them.' As the court below very aptly charged, knowledge is the essence of the offense, and unless there be a guilty knowledge, there can be no conviction. Again, quoting from the Cobb case, *supra*: 'Knowledge may well be deduced from the conduct and behavior, the character of the person from whom received, and the kind of goods, and the hour when received.' (Italics ours.)

The word "knowing," as used in a statute similar to the one under which plaintiff in error was convicted, has been defined by the supreme court of Oregon, in the case of Tucker v. Constable, 16 Ore. 407, 19 Pac. Rep. 13, 14, as follows:

"The word 'knowing,' as used in this statute, does not imply exact knowledge. I think that notice in its legal acceptation is what the statute requires. It is such information as would lead a prudent man to believe that the fact existed, and that, if followed by inquiry, must bring knowledge of the fact home to him. It is not necessary that this information should be formally communicated to the party to be affected by it. But if in any way he has become possessed of such information and it is of such a nature as to induce a prudent man to believe in its truth, he is not at liberty to disregard it, and if he does he will thereafter act at his peril. In such case information which a prudent man believes, or has reason to believe, is true, if followed by inquiry, must lead

to knowledge, is itself equivalent to knowledge. When the rights of others are concerned, a man possessed of such information must not shut his eyes."

Wharton's Criminal Law (11th Ed.), § 1230, page 1449, lays down the rule as follows:

"Whether the defendant knew that the goods were stolen is to be determined by all the facts of the case. It is not necessary that he should have heard the facts from eyewitnesses. He is required to use the circumspection usual with persons taking goods by private purchase; * * * That which a man in defendant's position ought to have suspected, he must be regarded as having suspected, as far as was necessary to put him on his guard and on his inquiries."

See also:

People v. Clausen, 120 Cal. 381, 52 Pac. Rep. 658.

Commonwealth v. Leonard, 140 Mass. 473, 4 N. E. 96.

State v. Feuerhausen, 96 Iowa, 299 65 N. W. 300.

State v. Druxinman, 75 Pac. 814, 34 Wash. 257.

State v. Feiss, 66 Atl. Rep. 418.

Counsel has cited a few cases which hold, as he claims, that portions of the instructions were erroneous, but all of the cases which are cited by plaintiff in error under this heading do not hold as he claims they do. The barest examination of such cases will confirm this

statement.

The case of *State v. Crawford*, 39 S. C. 343, 17 S. E. 799, contains the words he has quoted from it but these were stated in that portion of the opinion passing upon the indictment and not on instructions.

In the case of *Pickering v. U. S.* 101 Pac. 123, the court held the instruction to be a comment on the evidence—no such contention is made in the case at bar.

In *Toliver v. State*, 8 S. W. 806, the appellate court merely held the evidence was insufficient to sustain the verdict. The same holding was made in the case of *Stripland v. State*, 40 S. E. 993.

It is most significant to note that the instruction quoted in the brief of plaintiff in error, from the case of *Kirby v. U. S.*, 174 U. S. 47, was not considered by the supreme court of the United States in deciding that case. The sole ground for reversal in the *Kirby* case, instead of being on account of such instruction, was solely that it was held that defendant had not been confronted with the witnesses for the government. If anything can be assumed from the *Kirby* case, as to the correctness or incorrectness of this instruction, which counsel for plaintiff in error quotes, the assumption must be in favor of defendant in error, as that instruction is similar to what is complained of in the case at bar. If the giving of said instruction in the *Kirby* case was so greatly prejudicial to a defendant, the appellate court would, at least, have commented

upon it in a few words and not have passed it without a word of condemnation or approval.

If any of the cases cited in the brief of plaintiff in error hold contrary to those cited herein, they assuredly are, as was said in *Ex parte Drexel*, 82 Pac. Rep. 429, "not of sufficient consequence to ruffle the great current of authority which runs the other way."

It is respectfully submitted that, in the instructions complained of, the jury was told nothing more than the meaning of the words "knowing the same to be stolen," and how knowledge could be determined. Such instructions did not imply or suggest, and were not intended to imply or suggest to the jury, that anything less than knowledge was sufficient to convict.

REMARKS OF THE COURT.

The argument of counsel for plaintiff in error under this heading is very interesting and is undoubtedly what he very much desires to have adopted as the law. Inasmuch as no cases are cited by plaintiff in error to sustain this argument we assume there are none in his favor, and content ourselves with the following quotations and citations which conclusively show that it was proper for the trial court to refuse to accept an incomplete verdict. No error was committed by the court in mentioning to the jury the fact that great expense had been incurred in trying the defendants and that both the government and de-

endants were entitled to have the case determined.

Wilson v. State, 29 So. 569, 572.

Johnson v. State, 60 Ark. 45; 28 S. W. 793.

Allis v. U. S., 73 Fed. at 182.

In the absence of any showing that prejudicial error resulted to defendant, by reason of the remarks of the trial court to the jury, that it involved a great expense to get a new jury, and for them to return to the jury room and consider their verdict until they agreed, which they did and returned a verdict a few minutes later, no error would be presumed.

Jordan v. State, 30 S. W. 445.

In the case of Allis v. U. S. 73 Fed. 182, Sanborn Circuit Judge, gave a charge to the jury under circumstances very similar to those in the case at bar, and the language of Judge Sanborn was almost identical with that now under consideration. This was held not to be error by the supreme court of the United States, on an appeal to it,

Allis v. U. S. 155 U. S. 117, 15 Sup. Ct. 36.

Similar remarks of the court to the jury were held not to be error in the case of State v. Gorham (Vt.), 31 Atl. 845; we quote from the syllabus:

“A statement by the court to a jury upon their being sent back after disagreement, to further consider the case, that the trial had been ‘quite expensive to the state, and the expense ought not to

be thrown away,' accompanied by reasons showing that the prisoner's interests would be served by a determination of the case, was not erroneous, as attempting to induce an agreement on account of the expense to the state."

The supreme court of Wisconsin has likewise held the same in the case of *Hannon v. State*, 36 N. W. 1, where it is said:

"The learned judge stated to the jury that 'the county ought not to be subjected to the costs of another trial if it can be avoided.' To this, exception was taken. It may not be good taste to call the attention of the jury to the fact that the county or state will be subject to pecuniary loss if the jury fail to agree, especially in a criminal case, but we cannot say that it is error. It does not mislead, or tend to mislead, the jury as to the facts of the case under consideration; and it might, if it had any effect, be as effectual in inducing the jury to acquit the accused as to convict him."

The supreme court of California in the case of *People v. Miles*, 143 Cal. 636, 77 Pac. Rep. 666, where the remarks of the court as to the cost and expense of the trial and his insistence upon an agreement of the jury were much stronger than in the case at bar, held that no error was committed.

INSUFFICIENCY OF THE EVIDENCE.

Inasmuch as the court will carefully read the evidence contained in the record for the purpose of satis-

ifying itself as to its sufficiency or insufficiency, any attempt of counsel for either plaintiff or defendant in error to state in a few paragraphs just what was proven on the trial is of little value to the appellate court. In the present case, however, we desire to call the attention of the court to certain matters that counsel for plaintiff in error has evidently inadvertently overlooked, in his statement of what was proven.

The record contains an admission on behalf of plaintiff in error that with the exception of three head described in the fourth count, he received, branded, and had in his possession the cattle described in the indictment, and such cattle were at that time stolen property (Rec. 34). This eliminates these important questions from an investigation of the transcript.

Counsel for plaintiff in error further admitted that the cattle, not described in the indictment, and the brands on them, were owned by the various parties testifying to those facts, and that such owners never sold or disposed of the same, or gave anyone permission to drive them away. (Rec. 70, 71.)

The evidence shows that the CZ steer (Rec. 39), the T Anchor P steer (Rec. 40, 57), were found in the possession of plaintiff in error. In case there should be any doubt as to whether or not the admission, above mentioned, covered these animals, a reference to the record will show that they were stolen (Rec. 78, 79; 70, 65).

Bostwick testified that he sold the Connolley and Cobell steers to Mitchell Peterson in July, 1910, (Rec. 87), and that two or three months afterwards Connolley found these steers with the Peterson brand on them, claimed them, and plaintiff in error permitted him to take them away, and later plaintiff in error made Bostwick repay the purchase price of \$60. because these steers had been stolen. (Rec. 88, 117, 121). The witness Burd corroborates this (Rec. 122, 123). Bostwick testified that he stole these two steers (Rec. 89).

The T Anchor P. Steer is certainly entitled to the separate caption given it by plaintiff in error in his brief. This steer was not only proven to have been stolen by Bostwick but also that the theft occurred in the presence of plaintiff in error, and it was purchased by him for a greatly inadequate price. The price of the other cattle sold to plaintiff in error was \$30, but this choice steer only brought \$18.00 (Rec. 99, 100, 113, 114, 115).

The incident of the Cobell and Connolly steers being claimed by Connolly happened shortly before the purchase of the T Anchor P. steer and the four head described in the first count of the indictment (Rec. 100, 101). The roundup quit about October 19th, 1910, (Rec. 95). The T Anchor P. steer was first seen by Bostwick about that date (Rec. 98), and a day or two afterwards it was sold to plaintiff in error (Rec. 99), and on the 20th of October the four head

described in the first count were sold to him (Rec. 107) they were picked up by Bostwick on October 18th or 19th (Rec. 96).

The plaintiff in error did not introduce any evidence to deny anything said by the witness Bostwick, or in fact any other witness. The jury had the right to believe or disbelieve the evidence introduced. They are presumed to have followed the instructions which told them the guilt of plaintiff in error must be proven beyond a reasonable doubt, and having found him guilty the question now is was the evidence sufficient to justify a verdict and will it sustain such verdict.

It is respectfully submitted that under all of the authorities very slight circumstances, in addition to the fact that the property was stolen, and in the possession of a defendant will be held to sustain a verdict.

See authorities *supra*.

It was for the jury to say whether the circumstances proven by the evidence were sufficient to show a guilty knowledge on the part of plaintiff in error, and having so found from the facts this court will not disturb the verdict.

We respectfully submit that a most careful examination of the evidence by this court will disclose a case made out that justified the conviction.

FAILURE OF RECORD TO AFFIRMATIVELY SHOW ARRAIGNMENT OR PLEA.

Plaintiff in error, in the last subdivision of his brief herein, states that the record in this case “fails entirely to show, affirmatively that plaintiff in error was either arraigned or pleaded to the indictment.” He then proceeds to argue that, by reason of such failure of the record to affirmatively show these facts, the judgment should be reversed and the case remanded for a new trial—this in spite of the fact that there is no assignment of error covering this proposition. It is evident that this contention is made solely in hopes that the rule laid down in the case of *Crain vs. U. S.* 162 U. S. 625, and *Shelp v. U. S.* 81 Fed. 694, will be held to apply in this case and a reversal be secured by virtue thereof.

We concede the rule, under the cases, *supra*, to be that when the record is barren of anything showing that a plea has been entered, the judgment is a nullity. But have we a case similar to the cases above cited?

In the *Crain* case, *supra*, the supreme court of the United States said the facts were as follows:

“The record does not show that the accused was ever formally arraigned, or that he pleaded to the indictment, unless all that is to be inferred simply from the order, made at the beginning of the trial and as soon as the accused appeared, reciting that the jury were selected, impaneled, and sworn ‘to try the issue joined’, and from the

statement in the bill of exceptions that the jury were 'sworn and charged to try the issues joined.' What that issue was is not disclosed by the record."

This court, in the *Shelp* case, *supra*, in commenting on the facts, said:

"The bill of exceptions shows 'that the issue joined in the above stated case between the said parties came on to be tried before said judge and the jury which was duly impaneled and sworn to try the issues between the said parties.' "

The above were the facts existing in those cases, but, in the case at bar, we have an entirely different record. The judgment, on pages 15 and 16 of the record, herein, reads as follows:

"The United States Attorney with the defendant and his counsel present in court.

"The defendant was duly informed by the court of the nature of the charge against him, * * * * and of his indictment, arraignment and plea of not guilty as charged in said count one of the indictment." &c.

These recitals in the judgment are solemn recitals of certain facts that the trial court found to exist at the time judgment was entered. They are not orders of the kind that were present in the *Crain* case, *supra*, or recitals such as were contained in the bill of exceptions in either the *Crain* or *Shelp* cases, *supra*. Can it be said that the statement of such facts as are contained in the judgment herein are false. Counsel

for plaintiff in error will, I am sure, concede that if such a recital was contained in a minute entry of the trial court that its truthfulness could not be questioned by him, unless he made a showing that it was actually false. How, then, can he be heard to question the truthfulness of such a recital in the judgment of the court itself?

Counsel for plaintiff in error admits that these recitals are in the judgment herein, but contends they are not the affirmative showing in the record that is required by the Crain and Shelp cases, *supra*. Unless this court holds that these recitals are of no force and effect, are meaningless, that a judgment shows nothing affirmatively but the penalty imposed thereby, the contention of plaintiff in error, that the judgment should be reversed because of what he calls a lack of an affirmative showing in the record that a plea was entered, is untenable.

The supreme court of the United States, in the case of *Pointer v. U. S.*, 151 U. S. 419, held:

“While the record of a criminal case must state what will affirmatively show the offense, the steps, without which the sentence cannot be good, and the sentence itself, ‘all parts of the record are to be interpreted together, effect being given to all, if possible and a deficiency at one place may be supplied by what appears in another.’ 1 Bishop Crim. Proc. § § 1347 1348.”

There is nothing in the case of *Crain v. U. S.*, *supra*, that changes the holding in the *Pointer* case,

supra, for in the Crain case the record was absolutely silent of any recital of the steps taken throughout the proceeding as are required to sustain a judgment of conviction.

It has been held that in a criminal case the record in the trial court will not be interpreted to show error if it is susceptible of a reasonable interpretation to the contrary.

State v. Durein 70 Kan. 1, 78 Pac. 152,
affirmed on rehearing;

70 Kan. 13 80 Pac. 987;
also affirmed in

Durein v. State, 208 U. S. 613.

A recital, in a judgment of conviction of homicide, that accused was arraigned, and pleaded not guilty, is sufficient on appeal.

West v. State, 40 Tex. Cr. R. 148, 49 S. W. 95.

Villereal v. State (Tex.), 61 S. W. 715.

Watts v. State (Ala.), 39 So. Rep. 455.

In the case of Villereal v. State, just cited, it was held that such a recital in the judgment was conclusive on appeal.

See, also:

Jackson v. State, 142 Ala. 55, 37 So. Rep. 920,
where it was held that when a judgment affirmatively shows that issue was joined on a plea of not guilty,

such recital in the judgment excludes any assumption that issue was joined on a plea in abatement to the affidavit on which defendant was arrested and tried, the record showing no disposition of such plea in abatement.

Inasmuch as the judgment itself, in the case at bar, affirmatively shows all the necessary and requisite steps, to which plaintiff in error was entitled in the trial court, it is respectfully submitted that the rule enunciated in the Crain and Shelp cases, *supra*, does not apply.

In conclusion, we most respectfully submit that the case at bar is one in which defendant has been given every opportunity to defend himself and has not been deprived of any constitutional right. The record is barren of any error whatsoever and the contentions of plaintiff in error that he was not speedily or properly tried and convicted are merely imaginary wrongs that do not exist and are only the result of serious after thought on the part of his counsel in an endeavor to prevent the law taking its course.

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